SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 665

ANGELO HERNDON, APPELLANT,

vs.

THE STATE OF GEORGIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

INDEX

	Original	Print
Record from Superior Court of Fulton County	1	1
Bill of exceptions	1	1
Supersedeas order	4	4
Indictment	7	5
Verdict	12	9
Motion to quash indictment	12	9
Order overruling motion to quash	13	10
Plea in abatement nad order overruling same	13	11
Motion to quash traverse jury panel and order overruling same	14	12
Motion for new trial	16	13
Order to show cause and supersedeas	16	13
Amended motion for new trial	17	14
Order overruling motion for new trial	80	40
Brief of evidence	82	41
Hearing on motion to quash indictment	82	41
Testimony of Oscar Palmour	82	41
A. S. Nance	84	43
George H. Sims	85	44
F. J. Paxon	86	45
A. Gordon Hardy	87	47
R. B. Gaines	88	47
E. D. Thomas	88	48

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 4, 1935.

6087-C

	Original	Print
Testimony of W. S. Richardson	88	48
J. W. Simmons	89	48
Fred McSwain	89	49
Guy A. Moore	89	49
Hearing on motion to quash jury panel	90	50
Testimony of Oscar Palmour	90	50
George H. Sims	91	51
A. Gordon Hardy	92	52
A. S. Nance	92	52
F. J. Paxon	94	53
John H. Hudson	95	54
J. W. Simmons	95	55
Hearing before jury	97	56
Testimony of F. B. Watson	97	56
J. W. Clonts	100	58
F. B. Watson (recalled)	101	59
E. A. Stephens	102	60
F. B. Watson (recalled)	109	64
Mercer G. Evans	118	68
Angelo Herndon	118	70
T. J. Corley	128	78
W. T. Turner	133	82
R. N. Holland	138	86
Dr. J. C. Blalock	142	89
Brief of documentary evidence	146	92
No. 1—Receipt book	146	92
2—Receipt book	146	92
3—Membership book No. 51088	147	93
4—Membership book No. 51000	152	97
5 to 11 inc.—Membership books	153	98
12—Certificates of contribution	154	99
13—Booklet entitled "The Communist Position on the Negro Question"	156	102
14—Issue of "The Communist", July, 1932	167	111
15—Book entitled "Communism and Christianism"	169	112
16—Leaflet entitled "An Appeal to Southern Young Workers"	169	112
17—Booklet entitled "Party Organizer"	170	113
18—Book entitled "The Life and Struggles of Negro Toilers"	170	113
19—Book of receipts	173	115
20—Minutes of Section Committee	174	117
21—Minutes and notes of "Ford and Foster Club"	175	117
22 to 25, inc.—Postoffice box rent receipts	176	118
26—Minutes of Foster & Ford Clubs	177	119
27—Application for membership	178	120
28—Copy of "Daily Worker", July 8, 1932	179	121
29—Copy of "Daily Worker", July 8, 1932	181	122
30—Circular letter	183	123
31—Circular	184	124

	Original	Print
Order approving brief of evidence	186	126
Charge to jury	187	126
Defendant's requests to charge	200	137
Judgment	202	139
Pauper affidavit	203	140
Clerk's certificate (omitted in printing)	208	
Order to transmit additional portion of record	205	140
Counter-showing of State to amended motion for new trial (omitted in printing)	206	
Proceedings in Supreme Court of Georgia	225	141
Opinion, Bell, J.	225	141
Judgment	274	179
Notice of petition for certiorari	275	180
Supersedeas order	276	180
Order as to transcript of record	277	181
Clerk's certificate (omitted in printing)	278	
Order further staying execution of judgment	279	181
Petition for leave to file motion for rehearing	280	182
Exhibit "A"—Notice of petition for certiorari (copy), (omitted in printing)	286	
Exhibit "B"—Supersedeas order (copy), omitted in printing)	287	
Exhibit "C"—Motion for rehearing	288	188
Acknowledgment of service	293	192
Opinion, Bell, J., on motion for rehearing	295	192
Order denying motion for rehearing	305	200
Order allowing appeal	306	200
Petition for appeal, assignments of error and prayer for reversal	308	201
Citation and service (omitted in printing)	330	
Bond on appeal (omitted in printing)	333	
Praecipe for transcript of record	337	205
Clerk's certificate (omitted in printing)	339	
Statement of points to be relied upon and designation as to printing record	340	207

[fols. a & 1]

IN SUPERIOR COURT OF FULTON COUNTY

Bill of Exceptions—Filed July 13, 1933; Filed in Supreme Court July 26, 1933

GEORGIA,
Fulton County:

Be it remembered that on the 16th day of January 1933, at the regular January term, 1933, of the Superior Court of Fulton County, before Hon Lee B. Wyatt, then and there presiding, there came on for trial the case of the State of Georgia vs. Angelo Herndon; the same being an indictment wherein the said Angelo Herndon was charged with the offense of "Attempting to incite insurrection."

Be it further remembered that before pleading to the merits of the case, defendant on January 16, 1933, filed a motion to quash the indictment on the grounds that members of his race (Negroes) were systematically excluded from the grand jury that indicted movant because of race; that defendant offered evidence in support of said motion to the Court (out of the presence of the jury) as agreed by counsel for both sides, and after argument by counsel in support of said motion to quash the indictment the court passed an order January 16, 1933, overruling and denying said motion to quash the indictment on each and every ground set forth in said written motion, to which decision defendant herein, Angelo Herndon, excepted, now excepts and assigns the same as error. This assignment of error is set forth in ground 9 page 47 of the amended motion for new trial, and the evidence offered in support of said motion is set forth in the Brief of Evidence.

Further, after filing a motion to quash the indictment, defendant on January 16, 1933, filed a plea in abatement to quash the indictment on the grounds that members of his race (Negroes) were systematically excluded from the grand jury that indicted defendant, because of race; that defendant offered evidence in support of said plea in abatement to the Court (out of the presence of the jury as agreed by counsel for both sides), and after argument by counsel in support of said plea in abatement to quash the indictment on the grounds that Negroes were systematically ex-

cluded from the grand jury because of race, that indicted defendant, on January 16, 1933, the court passed an order overruling the plea in abatement on each and every ground set forth in said plea, to which decision defendant herein, Angelo Herndon, excepted, now excepts and assigns the [fol. 2] same as error. This assignment of error is set forth in ground 11, page 53 of the amended motion for new trial and the evidence offered by defendant in support of said plea is set forth in the Brief of Evidence.

Further, before pleading to the merits of the case, defendant demand a full traverse jury panel of 48 jurors, and then and there on the 16th day of January, 1933, filed a motion to quash the whole panel on the grounds that members of defendant's race (Negroes) were systematically excluded from the jury that was empaneled to try defendant because of race; defendant offered evidence to the court (out of the presence of the jury) in support of said motion, and after argument of counsel in support of said motion, the court passed an order January 16th 1933, overruling the said motion to quash the whole jury panel on each and every ground set forth in said motion, to which decision defendant herein, Angelo Herndon, excepted, now excepts and assigns the same as error. This assignment of error is set forth in ground 12, page 57 of the amended motion for new trial, and the evidence offered by defendant in support of said motion is set forth in the Brief of Evidence. The defendant's request for a full panel of 48 jurors was granted.

Be it further remembered that after evidence had been introduced and both sides had closed, the jury returned a verdict — the said Angelo Herndon guilty of "Attempting to incite insurrection."

Be it further remembered, that said defendant in regular course and within the time prescribed by law, duly filed his motion for new trial, filed his brief of evidence in said case and his amended motion, all of which were approved and certified by the judge, and the said motion for new trial was duly and regularly continued for hearing until June 24, 1933, and after hearing argument by counsel in support of motion for new trial as amended, the Hon. Lee B. Wyatt, said judge on the 5th day of July, 1933, passed an order overruling said motion for new trial as amended, to which judgment of the court in overruling said motion for new

trial as amended, plaintiff in error then and there excepted, now excepts and assigns the same as error.

[fol. 3] Angelo Herndon names himself as plaintiff in error herein and the State of Georgia as defendant in error.

Plaintiff in error specifies as material to a clear understanding of the errors complained of, the following portions of the record to wit:

1. The indictment together with all entries thereon together with the plea of not guilty and the verdict of the jury entered thereon.

2. The motion to quash the indictment and the order overruling said motion to quash the indictment.

3. The plea in abatment to quash the indictment and the order overruling said plea to quash the indictment.

4. The motion to quash the petit jury panel and order overruling said motion to quash petit jury panel.

5. The motion for new trial, together with the amendment thereto and order overruling said motion for new trial as amended.

6. The Brief of Evidence, agreement of counsel thereon, and approval of said brief by said Honorable Lee B. Wyatt.

7. The charge of the court together with entries thereon.

8. Plaintiff's in error requested charge.

9. The sentence of the Court.

And now, within the time allowed by law, comes defendant in said case, Angelo Herndon, now plaintiff in error, and tenders this his bill of exceptions and prays that the same may be signed and certified to the October Term, 1933, of the Supreme Court of Georgia in order that the errors alleged to have been committed may be considered and corrected.

Respectfully submitted, John H. Greer, Benjamin J. Davis, Jr., Attorneys for Angelo Herndon, Plaintiff in Error. Post Office Address: 250 Auburn Avenue, N. E., Atlanta, Georgia.

[fol. 4] Certificate

I do certify that the foregoing Bill of Exceptions is true and correct; and specifies all the record material to a clear

understanding of the errors complained of in this Bill of Exceptions; and the Clerk of the Superior Court of Fulton County, Georgia, is hereby ordered and directed to make out a complete copy of such parts of the record in said case as are in this Bill of Exceptions specified, and certify the same as such, and cause the same to be transmitted to the October Term, 1933 of the Supreme Court of Georgia in order that the errors alleged to have been committed may be considered and corrected.

This 12th day of July, 1933.

L. B. Wyatt, Judge, S. C. C. C.

Due and legal service of the within Bill of Exceptions acknowledged, copy received, all other and further service waived.

This 12th day of July, 1933.

J. W. LeCraw, John H. Hudson, John A. Boykin,
Solicitor-General, Fulton County, Georgia, A. C.

IN SUPERIOR COURT OF FULTON COUNTY

Case No. 37,812

STATE OF GEORGIA

VS.

ANGELO HERNDON

"Attempting to Incite Insurrection"

SUPERSEDEAS ORDER

To the Clerk of the Superior Court and the Sheriff of Fulton County:

Angelo Herndon, defendant in trial court, having tendered a bill of exceptions, in the above stated cause, which has been allowed and signed; therefore, we command you [fol. 5] that you wholly cease from any further proceedings whatsoever in relation to said cause, until further orders.

Given under my hand and official signature this 12th day of July, 1933.

L. B. Wyatt, Judge, S. C. C. C.

[fol. 6] Clerk's Certificate to foregoing bill of exceptions omitted in printing.

(File endorsements omitted).

[fol. 7] In Superior Court of Fulton County

Indictment

The grand jurors selected, chosen and sworn for the County of Fulton, to wit:

Fulton Superior Court, Criminal Division,

Grand Jurors for July Term, 1932.

1. Fred McSwain, Foreman

2. Frank C. Owens	13. J. E. Bennett
3. Homer C. Hall	14. C. L. Corlee
4. P. A. Clark	15. R. S. Rust, Jr.
5. O. D. Witherspoon	16. J. W. Wray
6. J. C. Slade, Jr.	17. G. H. Turnipseed
7. F. R. Coleman	18. H. M. Peck
8. M. T. McCullough	19. A. Levy
9. J. E. Varela	20. A. J. Collier
10. L. J. Smith	21. C. B. Anderson
11. L. F. Green	22. H. H. Steed
12. R. S. Paden	23. J. C. Bryant

in the name and behalf of the citizens of Georgia, charge and accuse Angelo Herndon with the offense of Attempting to Incite Insurrection, for that said accused, in the County of Fulton and State of Georgia, on the 16th day of July, 1932, with force and arms, did make an attempt to incite insurrection and did make an attempt to induce others to join in combined resistance to the lawful authority of the State of Georgia with intent to the denial of the lawful authority of the State of Georgia and with intent to defeat and overthrow the lawful authority of the State of Georgia by open force and by violent means and by unlawful acts, said attempt to incite insurrection intended to be manifested by accused by unlawful acts and intended by accused to be accomplished by acts of violence, said attempt to incite [fol. 8] insurrection being made by accused in the following manner to wit:

(1) Accused did call and did attend public assemblies and mass meetings in the homes of various persons whose

names and addresses are to the Grand Jurors unknown and did make speeches to various persons to the Grand Jurors unknown, the purpose of said meetings and the purpose of said speeches being to organize, to establish and to set up a group and combination of persons white and colored, under the name and style of The Communist Party of America for the purpose of uniting, combining and conspiring to incite riots, to embarrass and impede the orderly processes of the courts and for the purpose of offering and making combined opposition and resistance to the lawful authority of the State of Georgia and for the purpose of overthrowing and defeating by force and violence the lawfully constituted authority of the State of Georgia, all of which said meetings were held in various places and for various occasions which are to the Grand Jurors unknown.

(2) Accused did by speech and by persuasion, solicit and did attempt to persuade and solicit certain persons whose names are to the Grand Jurors unknown to combine with, to join and to confederate with and to become members of The Communist Party and The Young Communist League and to become members, agents, and parties to and of The Communist Party of America, to the intent and purpose of creating, offering, establishing and waging war against the lawfully constituted authority of the State of Georgia for the purpose of acts of violence and by revolution and establishing in the place of said lawfully constituted authority of the State of Georgia a new government known as United Soviets Soviet Russia, sometimes called and known as "The Dictatorship of the Propertyless People."

(3) Accused did introduce and did circulate and did cause to be introduced and circulated and did aid and assist in introducing and circulating certain booklets, papers and other writings with the intent and purpose of inciting insurrection, riot, conspiracy, uprisings against the con-
[fol. 9] stituted authority of the State and for the purpose of establishing combined resistance to and against the lawful authority of the State of Georgia, the names and contents of said books, papers and writings in part are as follows hereinafter, their full contents being of such a nature as that they cannot be copied in full in this indictment: Book A. "The Life and Struggles of Negro Toilers" by Geo. Padmore, Pg. 46. Therefore unlike their black

brothers in Africa the negroes in the new world have had centuries of contact with the white capitalist civilization. But like the negroes in Africa they are subjected to the same barbarous methods of imperialist plunder and exploitations. * * * In no other so-called civilized country in the world are human beings treated as badly as these 15 million Negroes. They live under a perpetual regime of white terror, which expresses itself in lynchings, peonage, racial segregation and other pronounced forms of white chauvinism. * * * They are absolutely at the mercy of every fiendish mob incited by the white landlords and capitalists. Banks of Business and professional men make periodical raids upon the black countryside, where they lynch Negroes burn homes and destroy the crops and other property belonging to the blacks. In most cases of lynching the Negroes are burned to death after their bodies have been soaked in gasoline, while others are hanged from trees. On these occasions the entire white community turned out to witness the bloody spectacles, which were made."Roman Holidays."

And many other passages of similar import as on page 48 of said book, White people are accused of burning the homes, destroying crops, killing live stock, poisoning drinking water wells, murdering and lynching unarmed men, women and children.

Book B. "Party Organizer"—Special Plenum Issue—Vol V, May—June 1932, No. 5 & 6. Issued by Central Committee Communist Party U. S. S. Same being a book of instructions to the organizers of the Communist Party and containing the details of methods of approaching factories, cotton mills, industrial plants and shops and containing instructions, doctrines, and teachings as to the methods of preparing and organizing strikes in the various [fol. 10] shops, industrial plants, cotton mills and other places where people work, containing information as to methods of training and developing and organizing workers and leaders in the Communist Party and in building up and bringing on strikes, riots, and revolutions.

Book C. "Communism And Christianism," by Wm. Montgomery Brown—"Banish the Gods from the Skies and Capitalists from the Earth and Make the World Safe from Industrial Communism", in part as follows:

Page 6: As the machinery of capitalist government, including the armed forces of the nation, conserves the monop-

oly by the capitalist class of the wealth taken from the workers, the working class must organize consciously and politically for acquiring the powers of government, national and local, in order that this machinery, including these forces, may be converted from an instrument of oppression into the agent of emancipation and the overthrow of privilege, aristocratic and plutocratic."

On pages 98 and 99 of said book: "The trouble with every reformatory socialism of modern times is, that it undertakes the impossibility of changing the fruit of the capitalistic state into that of the communistic one, without changing the political organism; but to do that is as impossible as to gather grapes from thorns or figs from thistles. Hence an uprooting and replanting are necessary (a revolution not a reformation) which will give the world a new tree of state.

Capitalism no longer grows the fruits (foods, clothes and houses) which are necessary to the sustenance of all the world. Hence it must be dug up by the roots in order that a tree which is so organized that it will bear these necessities for the whole world may be planted in its place.

Certain newspapers call- the Daily Worker and The Southern Worker being the official organ of the Communist Party and containing various articles, criticising the courts of the United States and the various states and designed and intended to scatter and carry and implant in the minds of the people and citizens of Georgia hatred and contempt against all constituted authority of the state with intent to the overthrow, denial and defeat of the lawfully consti-
[fol. 11] tuted authorities of the State.

And all of the acts of the accused being done by accused with intent to formulate and to establish and to set on foot and to make effective combined resistance by force and violence in the lawful authority of the State of Georgia and to cause, produce and bring to pass the defeat denial, and overthrow by acts of violence, by unlawful means and by revolution, the lawfully constituted authority of the State of Georgia as above set forth and all of the acts of the accused were and are * * * contrary to the laws of said State, the good order, peace and dignity thereof.

John A. Boykin, Solicitor General, Special Presentment Prosecutor.

AR—Jail
Spcl.

Witnesses: J. J. Chester, F. D. Watson, 175 Decatur St. George Pounds, E. A. Stevens, c/o Solicitor's Office.

Sol's No. ——. Clerk's No. 37812.

Fulton Superior Court

The State

vs.

Angelo Herndon.

Attempting to Incite Insurrection

429

True Bill

22 day of July, 1932.

Fred McSwain, Foreman.

Angelo Herndon does not waive copy of indictments, list of witnesses, full panel, formal arraignment, and pleads [fol. 12] not guilty but demands formal arraignment, and is formally arraigned in accordance with his request.

John A. Boykin, Sol. Gen., and John H. Hudson, J. W. LeCraw, E. A. Stephens, Assistants Sol. General.

In Superior Court of Fulton County

Verdict

We the jury find the defendant, Angelo Herndon, guilty and recommend him to mercy, and fix his penalty at from 18 years to 20 years.

January 18th, 1933.

John H. Parker, Foreman.

In Superior Court of Fulton County

[Title omitted]

Motion to Quash Indictment—Filed Jan. 16, 1933

Now comes the defendant in the above-named case, and before being arraigned, before waiving arraignment, be-

fore pleading guilty, before pleading in abatement, files his motion to quash this indictment, and shows:

1. That Negroes were wrongfully, unlawfully, systematically and intentionally excluded from the Grand Jury which indicted Angelo Herndon, in direct violation of the 14th Amendment of the Constitution of the United States, and of paragraph 3, article 1, of the Constitution of the State of Georgia.

2. That the Grand Jury was not legally convoked as required by the law of the State, and the law of the United States.

3. That the evidence submitted to the Grand Jury did not warrant a true bill of indictment being found against Angelo Herndon.

[fol. 13] 4. That the statute upon which said unlawful indictment is based is in direct violation of the Constitution of the State of Georgia, paragraph 15, article 1, and of the Constitution of the United States.

Therefore, the defendant prays that this indictment be quashed.

John H. Geer, Benj. J. Davis, Jr., Attorneys for Defendant.

[File endorsement omitted.]

In Superior Court of Fulton County

Order Overruling Motion to Quash

This motion to quash, being traversed by the State, and evidence heard by the Court without a jury, by agreement of counsel waiving a jury herein, the Court hereby overrules the motion to quash.

Jan. 16, 1933.

L. B. Wyatt, J. S. C. C. C.

IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

PLEA IN ABATEMENT—Filed Jan. 16, 1933

Now comes the defendant in the above-stated case, and before arraignment, before waiving arraignment, and before proceeding to trial, files this his plea in abatement: as follows:

I. That the indictment in said suit is null and void in that it was found by a grand jury from which Negroes were unlawfully and systematically excluded in violation of the 14th Amendment of the Constitution of the United States.

II. That the trial of the above said defendant in this [fol. 14] cause, upon the above said illegal indictment would be in direct contradiction of the 14th Amendment of the Constitution of the United States.

III. That the law upon which said indictment is based is in direct violation of the Constitution of the United States and of the Constitution of the State of Georgia.

IV. That the grand jury which found this indictment in the above said cause, was not lawfully convoked in that Negroes were illegally, intentionally and systematically excluded from said grand jury.

Wherefore, the defendant prays that this criminal suit abate, as provided by law.

John H. Geer, Benj. J. Davis, Jr., Attorneys for Defendant.

[File endorsement omitted.]

IN SUPERIOR COURT OF FULTON COUNTY

ORDER OVERRULING PLEA IN ABATEMENT

This Plea in Abatement, being traversed by the State, being heard by the Court, a jury trial hereon being waived by the defendant, after hearing evidence and argument

thereon this Plea is overruled and denied and the Court refuses to quash the Indictment.

Jan. 16, 1933.

L. B. Wyatt, Judge S. C. C. C. presiding.

In Superior Court of Fulton County

[Title omitted]

Motion to Quash Traverse Jury Panel—Filed Jan. 16, 1933

Now comes the defendant in the above-stated case as the panel of the jurors empaneled to try him is put upon him and after demanding a full panel of forty-eight (48) traverse jurors as required by law, and before proceeding to [fol. 15] trial, files this his motion to quash the traverse jury panel, and shows:

I. That Negroes were wrongfully, unlawfully, intentionally and systematically excluded from the traverse jury panel of the January term of Fulton County Superior Court, in direct violation of the 14th Amendment to the Constitution of the United States.

II. That the traverse jury panel was not legally convoked as required by the law of the State of Georgia, and of the United States.

Wherefore, the accused demands a fair and proper jury, for each and all the reasons hereinabove set forth, and contends that this panel should be quashed.

John H. Geer, Benjamin J. Davis, Jr., Geer & Davis, Attorneys for Defendant.

[File endorsement omitted.]

In Superior Court of Fulton County

Order Overruling Motion to Quash

This motion to quash jury panel being submitted to the Court, with evidence heard thereon, after hearing evidence and argument thereon, this motion is overruled.

This Jan. 16, 1933.

L. B. Wyatt, Judge S. C. C. C. presiding.

[fol. 16] In Superior Court of Fulton County

[Title omitted]

Motion for New Trial—Filed Jan. 19, 1933

Verdict and Judgment for 18 to 20 yrs. at January term, 1933, of Fulton Superior Court, on 18th day of January, 1933.

The defendant, Angelo Herndon, being dissatisfied with the verdict and judgment in said case, comes during said term of court, before the adjournment thereof, and within 30 days from said trial, and moves the court for a new trial, upon the following grounds to wit:

1st. Because the verdict is contrary to evidence and without evidence to support it.

2nd. Because the verdict is decidedly and strongly against the weight of the evidence.

3rd. Because the verdict is contrary to law and the principles of justice and equity.

Whereupon, Angelo Herndon prays that these, his grounds for a new trial, be inquired of by the court, and that a new trial be granted.

John H. Geer, Benjamin J. Davis, Jr., Attorney- for Movant.

In Superior Court of Fulton County

Order to Show Cause and Supersedeas

The foregoing motion read and considered. Let the motion be filed, served upon Counsel for the State of Georgia, and let the State of Georgia show cause before me on the 11th day of March (10 A. M.), 1933, why the motion should not be granted. Let this order act as a supersedeas until further order of Court. In the meantime and until the final hearing of said motion, whenever the same may be had, movant is allowed to amend and perfect the motion, and to prepare, present for approval, and file the brief of evidence in said case.

This 19th day of January, 1933.

L. B. Wyatt, Judge J. S. C. C. C. presiding.

[fols. 17-45] Due and legal service of the within motion and order acknowledged, time, copy and all other and further service waived.

This 19 day of Jan. 1933.

John A. Boykin, Attorney for —— ——, Sol. Genl.

[File endorsement omitted.]

In Superior Court of Fulton County

[Title omitted]

Amended Motion for New Trial—Filed July 6, 1933

Comes now Angelo Herndon, the defendant in the above stated case, and with leave of the Court first had and obtained, amends his motion for a new trial in said case, and by way of amendment adds the following additional grounds, to wit:

Ground 1. Because the following material documentary evidence was illegally admitted by the Court to the jury over the objection of movant, to wit:

The following documents found in the personal possession of movant, Angelo Herndon, in a box under his arm, at the time of his arrest, viz:

* * * * * * *

[fol. 46] Movant objected to the evidence as soon as and at the time it was offered, and then and there urged before the Court the following grounds of objection:

"That the solicitor has not exhibited any search warrant which authorized any officer to search defendant's person, nor has the solicitor exhibited any search warrant which authorized any officer to enter the defendant's room and seize the box and contents contained therein."

The court overruled the objection and admitted the evidence on the ground that wherein a person may resent taking property or evidence from him without a search

warrant but that if he permits it to be done, that it is admissible against him. The evidence was prejudicial, and hurtful to the movant, for the following reasons:

1. Because the State did not offer evidence to prove the documents insurrectionary.

2. Because the evidence was obtained through an illegal search and seizure.

3. Because Communist literature was not proven insurrectionary per se.

4. Because the papers, books and documents bearing upon Communism had only a slight and conjectural bearing on the issue "Attempting to incite insurrection," and could only serve to inject passion and prejudice and divert the minds of the jury from the issue of facts, and was therefore inadmissible.

[fol. 47] 5. Because the Communist Party is a legal political organization, and its candidates were entered on the ballot in this State in the 1932 Presidential election and the several principles of the party could not be imputed to show the intentions of one of its members in any given act, therefore such evidence tended to mislead the jury rather than help them reach a fair and impartial verdict.

6. Because there was no evidence that movant distributed the documentary evidence or that he was in any wise responsible therefor.

Movant avers that the inadmissibility of the evidence was beyond doubt and that said ruling was error, and movant assigns said ruling as error for the reasons stated.

Ground 2. Because the Court refused to permit Prof. Mercer G. Evans, a witness for movant to qualify as an expert to testify to the non-insurrectionary character of the documentary evidence introduced by the State.

That movant offered Prof. Evans to testify that the documentary evidence offered in evidence by the State was not insurrectionary.

Movant stating he expected the witness to testify that the said documentary evidence was not insurrectionary.

That Prof. Evans, witness for movant, while on the witness stand, and during the trial of the case, for the purpose of qualifying as an expert, testified as follows:

"I am a teacher at Emory University, in the department known as Economics. I have the Bachelor of Science (B. S.) Degree from Emory University, and the Master of Arts, (A. M.) and Doctor of Laws, Chicago University.

"I have been a teacher of Economics at Emory University for nine years. I have read rather widely in the field of Economics, the Theoretical Economics, including a good deal of Anarchistic and Sociological or Communistic literature, which is, of course of an economic nature. Some of the magazines that have carried my articles of an economic nature are: 'The Annals of American Academy of Social and Political Science', 'The American Federationist.'

[fol. 48] "I have read the books stated in this indictment."

The Court ruled that Prof. Evans had not qualified as an expert and would not permit him to give his opinion to the jury as to the non-revolutionary nature of the documentary evidence stated in the indictment and introduced in evidence by the State and movant here and now assigns said ruling as error and says:

That the evidence was material in behalf of the defendant and that its exclusion was hurtful and prejudicial to movant, for the following reason:

Because the documentary evidence submitted by the State was of such a theoretical and technical character that it should have been interpreted by an expert who had experience in the particular field covered by such evidence, and Communism is a system of economics that is highly theoretical and technical.

That the evidence was material to the issue involved in the case for the following reason:

That the expert opinion and comparison of Prof. Evans of the books and papers stated in the indictment and offered into evidence by the State with books and articles of similar character would have been a guide to the jury in determining what is not insurrectionary literature, and what is insurrectionary literature.

Movant here and now assigns the said ruling as error for the reasons stated.

Ground 3. Because the court erred in allowing the State on cross-examination of Prof. Mercer G. Evans, to offer to the jury, over the objection of movant, the following illegal evidence:

"I am acquainted with what is known as the Communists of Soviet Russia or the Soviet Union, of the present form of government in the nation of Russia, that is a government which succeeded in the Kerensky government, which succeeded the former Czarist government; that was brought about by a revolution, putting out the Czar and the assassination of the Czar and his family came later, not necessarily as the result of a revolution. As to the Russian [fol. 49] Revolution, history so regards it, that there was a revolution, the Czarist government overthrown, the Kerensky government took charge, and after about six months another revolution of bloodless character in which the present regime succeeded the Kerensky government; I wouldn't attempt to dispute that as an historical fact.

"I have been to Russia, I was over there this summer. I spent in Russia, about two weeks, I think."

Movant objected to the evidence as soon as and at the time it was offered on the grounds:

That those were all questions that necessitate an opinion and required Mr. Evans to answer with particular detailed knowledge of political science.

The Court overruled the objection and admitted the evidence, which ruling movant insist was error for the reason that the evidence was highly prejudicial and hurtful to movant.

The evidence showing that the Czarist government was overthrown by revolutionists, and that the Kerensky government of Russia was succeeded by the Communists, had no bearing whatever on the issue "Attempting to incite insurrection against the State of Georgia," and tended to mislead, confuse and inflame the jury rather than help them reach a fair and impartial verdict. Such evidence opened issues on cross-examination that were not touched upon directly or indirectly upon direct examination, and were remote and prejudicial to the facts constituting the bases upon which this trial was had, in that whether or not the

Czarist government was overthrown by revolution; the Kerensky government was overthrown by the Communist Party of Russia were not referable to the material issues in the trial of this case.

Ground 4. Because the following evidence was illegally admitted by the Court to the jury, on cross-examination of Prof. T. J. Corley, over the objection of movant, to wit:

"A negro doesn't happen to have the right to marry my daughter, under the laws of this State. I do not know how many States there are in the Union where they do have that right."

[fol. 50] Movant objected to the evidence as soon as and at the time it was offered, upon the grounds that:

There is nothing whatever in the Communist 1932 Election Platform about intermarriage.

The Court overruled the objection and admitted the evidence. Movant says that the admission of said evidence was highly prejudicial and hurtful to movant, for the following reasons:

1. That any evidence inferring that the defendant believed in intermarriage or was favorable toward the marriage of white and negro people was of such a prejudicial nature that the defendant could only suffer the grossest sort of hate and ridicule at the hands of the jury.

2. The introduction of the issue of miscegenation could only serve to inflame the minds of the jury and divert their minds from the material issues of facts adduced on the trial of said case.

Movant avers that said evidence was inadmissible beyond doubt for the reasons stated and insist that the Court erred in admitting the same and assigns said ruling as error.

Ground 5. Because the court erred in allowing Assistant Solicitor John H. Hudson, prosecutor for the State, to propound an irrelevant and prejudicial leading question in the presence of the jury over the objection of movant, to wit:

"Do you understand the Communist position equal rights for negroes to mean the right of a colored boy to marry your daughter, if you have one?"

That the above leading question was not referable to any evidence introduced on the trial and was not authorized by the evidence.

That movant objected to said leading question as soon as and at the time it was asked, and there urged before the Court the following grounds of objection:

"We object to the question as irrelevant and immaterial and calls for a conclusion of the witness."

That the Court overruled the objection and permitted Assistant Solicitor John H. Hudson to ask said illegal question which ruling movant insists was error, for the [fol. 51] reason: That the hurtful effect of the question was not eradicated and the jury was prejudiced beyond all doubt thereby and the court did not even attempt in the charge or otherwise to eradicate the injury done by injection of prejudice into the minds of the jury, as the only bearing said question could have on the issue was to prejudice the jury and divert their minds from the issue of facts adduced at the trial.

Said question was asked Prof. T. J. Corley on cross-examination.

That the above leading question was prejudicial to movant and inadmissible beyond doubt. The Court admitted the same over defendant's objections and movant assigns said ruling as error for the reasons stated.

Ground 6. Because Assistant Solicitor John H. Hudson asked an irrelevant and prejudicial leading question of the witness, T. J. Corley, in the presence of the jury, over the objection of movant, to wit:

"Did you know there are twenty States in the United States where the two races (white and negro) intermarry or mix?"

The movant objected to said leading question as soon as and at the time it was asked and then and there urged before the Court the following grounds of objection:

"We object to the question as irrelevant and immaterial and calls for a conclusion of the witness."

The Court overruled the objection and permitted Assistant Solicitor John H. Hudson to propound said prejudicial leading question, which said ruling movant insists was error for the reason:

That the prejudicial effect of propounding of said question was not eradicated and that the jury was prejudiced beyond doubt, and the Court did not attempt in the charge or other instructions to eradicate the injury done by injection of this remote and prejudicial issue, as the only bearing such a question could have on the trial of said case was to prejudice the jury and divert their minds from the material issue of facts adduced at said trial.

The above leading question was prejudicial and the court permitted same to be propounded over objection of movant's counsel and the movant assigns said ruling here and now as error for the reasons stated.

[fols. 52 & 53] Ground 7. Because during the progress of the trial the trial judge erred in that he did intimate that movant was guilty when he said in the presence of the jury when witness for movant, Prof. Mercer G. Evans, was testifying, to wit:

"The Court: "If Emory University is guilty of anything, we will try them; I think even if Emory University had actually attempted to incite riot, it wouldn't be material in this case; it is a question what this defendant has done."

Ground 8. Because the following material documentary evidence was illegally admitted by the court to the jury over the objection of the movant to wit:

* * * * * * *

[fol. 54] Movant objected to the evidence as soon as and at the time it was offered, and then and there urged before the court the following grounds for objection:

"That the Solicitor has not exhibited any search warrant which authorized any officer to search defendant's person, nor has solicitor exhibited any search warrant which authorizes any officer to enter the defendant's room and seize the box and contents contained therein."

The State of Georgia offered the evidence objected to.

That the court overruled the objection and admitted the evidence, saying he would admit the evidence to show the intent of defendant.

That the evidence was prejudicial and hurtful to movant, for the following reasons:

Because the "Communist Election Fund Certificate," calling for the support of a $100,000 party campaign fund, reciting the party platform was literature of a political [fols. 55 & 56] nature, used by a legal party that entered its candidates on the ballot in this State in the 1932 Presidential election, and such evidence had no bearing on the issue "Attempting to incite insurrection," and could only serve to prejudice the minds of the jury politically, therefore inadmissible; and further the very nature of such evidence tended to mislead the jury than help them make a fair and impartial finding.

The State did not attempt nor did it offer any evidence to prove said evidence insurrectionary.

That above mentioned evidence was identified by assistant solicitor Ed. Stevens and F. B. Watson, policeman, as the material found in movant's possession.

Movant avers that the inadmissibility of the evidence was beyond doubt; and the court admitted same over defendant's objection and movant assigns said ruling as error for the reasons above stated.

Ground 9. Because the court erred in overruling the motion to quash the indictment on the grounds state-, to wit Negroes were systematically excluded from the grand jury that indicted movant because of race, and said ruling was contrary to the evidence offered in support of two grounds of the motion to wit:

"1. That Negroes were wrongfully, unlawfully, systematically and intentionally excluded from the grand jury which indicted Angelo Herndon, in direct violation of the 14th amendment of the Constitution of the United States, and of paragraph 3, Article 1, of the Constitution of Georgia.

2. That the grand jury was not legally convoked as required by the law of the State of Georgia, and of the United States. Wherefore, defendant prays that this indictment be quashed.

The State admitted that there were no names of Negroes in the grand jury box from which the grand jury was drawn that indicted movant.

Movant offered the following testimony in evidence to prove Negroes were systematically excluded from the grand jury because of race, that indicted movant, to wit:

* * * * * * *

[fol. 57] The movant contends that the foregoing evidence [fol. 58] establish the following facts, to wit:

1. That no negro has been selected for grand jury service for 20 years or more.

2. That about one-third of the population are negroes.

3. That about one-fifth of the taxpayers are negroes.

4. That the jury commissioners select the most intelligent and best qualified white citizens for grand jury service as far as they can.

5. That there are 4,000 or more names in the grand jury box, from which the grand jury was drawn that indicted movant, but not a name of a Negro.

6. That, in the opinion of the jury commission, there were not Negroes intelligent enough for grand jury service except professional men.

There is no doubt as to the admissibility of the evidence offered.

Movant contends that overruling of the motion was hurtful and prejudicial to movant for the following reason:

That movant was forced to stand trial on a void indictment, i. e., an indictment found by a grand jury that members of his race (negroes) were systematically excluded from because of race, thereby denying him the right of equal protection of the law, as guaranteed by the 14th amendment of the U. S. Constitution.

That this motion to quash the indictment was made before arraignment, before pleading to the merits and before pleading in abatement.

That the ruling of the court in refusing to quash the said indictment was error, and movant here and now assigns said ruling as error for the reasons stated, and insists that said motion should have been sustained and said indictment quashed.

Movant further says that *that* the failure of the court to sustain said motion and to quash said indictment prevented movant from having, and he did not have, a fair and impartial trial by a jury of his peers, and that defendant was wrongfully and illegally convicted in said case under said indictment for the following reasons, to wit:

The Fourteenth Amendment to the Constitution of the

[fol. 59] United States, Section 1, reads as follows:

"Article XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall bridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Movant insists that he was deprived of his constitutional rights as guaranteed unto him and to all citizens of the United States under the provisions of the Fourteenth Amendment to the Constitution of the United States, Section 1, above quoted, by the refusal of the trial judge to quash said indictment for the reasons above-stated, that the system pursued by the jury commissioners of Fulton County, Georgia, of selecting grand jury lists and placing names of prospective grand jurors in the grand jury box, under the evidence above quoted, was but a scheme, trick, device, artifice to exclude systematically but thoroughly all members of the colored race from participation in the conduct of such affairs of the county as are entrusted to grand jurors; that said conduct of said jury commissioners in excluding all members of the colored race from the grand jury lists of said county and their names from the grand jury boxes and the refusal and failure of the trial court to quash said indictment upon the grounds therein stated, did, and does, abridge unto this movant the privileges or immunities of citizens of the United States, for the reasons stated, and does and did deprive movant of his liberty without due process of law, and is a denial unto movant of the equal protection of the laws, such as is guaranteed

into him and to all citizens of the United States, under the Fourteenth Amendment to the Constitution of the United States, Section 1, above set forth. Movant, therefore, insists that his constitutional rights to a fair and impartial trial have been denied him, that he has not had a fair trial for the reasons stated, that he has been deprived [fol. 60] of his liberty without due process of law, and that he has been denied the equal protection of the laws, and movant insists that a new trial should be granted him for all the reasons stated and movant further insists that the failure and refusal of the trial judge to sustain said motion and quash said indictment was and is error, and he hereby assigns the same as such.

Ground 10. Because the court, on hearing the motion to quash the indictment, erred in failing to require the State to offer evidence that Negroes were not systematically excluded, because of race, from the Grand Jury that indicted movant, for the following reasons:

1. That the State admitted there were no names of Negroes in the grand jury box from which the grand jury that indicted movant was drawn, thereby making out a prima facie case in favor of movant, i. e., that Negroes were systematically excluded from the grand jury that indicted movant, because of race.

2. That the failure of the court to require the State to offer evidence showing that Negroes were not excluded from the grand jury that indicted movant, because of race, added an extra burden of proof upon movant to prove "The reason why Negroes" names were not in the grand jury box from which the grand jury was drawn that indicted Movant" thereby denying movant due process of law, as guaranteed by the 14th Amendment of the U. S. Constitution.

That this motion to quash the indictment was made before arraignment, before pleading not guilty, and before pleading in abatement.

Movant contends that he was injured for the following reeasons:

Movant was tried on a void indictment, and that the ruling of the court was strongly contrary to weight of evi-

dence movant says that said ruling was error and assigns said ruling as error for the reasons stated.

Ground 11. Because the decision of the court in overruling the plea in abatement on the grounds that Negroes were systematically excluded from the grand jury that indicted movant because of race, was contrary to the evidence offered in support of said plea in abatement, to wit:

[fols. 61 & 62] "Now comes defendant in the above case and before arraignment, before waiving arraignment, and before proceeding to trial, files this his plea in abatement, as follows:

I. That the indictment in said suit is null and void in that it was found by a grand jury from which Negroes were unlawfully and systematically excluded in violation of the 14th Amendment to the Constitution of the United States.

II. That the trial of the above said defendant in this cause, upon the above said illegal indictment would be in direct contradiction of the 14th Amendment of the Constitution of the United States.

III. That the law upon which said indictment is based is in direct violation of the Constitution of the United States and of the Constitution of the State of Georgia.

IV. That the grand jury which found this indictment in the above said cause, was not lawfully convoked in that Negroes were illegally, intentionally and systematically excluded from said grand jury.

Wherefore, the defendant prays that this criminal suit abate as provided by law."

The State admitted that there were no names of Negroes in the grand jury box from which the grand jury was drawn that indicted movant.

Movant insists that said plea should have been sustained and that the Court erred in overrruling the same; and Movant assigns said ruling as error, for the reasons stated.

Defendant offered in support of said plea the following evidence, to wit:

* * * * * * *

[fol. 63] The court overruled said plea; and movant insists that the ruling of the court was hurtful and prejudicial to defendant for the following reasons:

That movant was forced to stand trial on a void indictment, i. e., an indictment found by a grand jury that members of his race (Negroes) were systematically excluded from, because of race, thereby denying him the right of equal protection of the law, as guaranteed by the 14th [fols. 64 & 65] Amendment to the U. S. Constitution.

That this plea in abatement to the indictment was made before arraignment and before pleading to the merits.

That the ruling of the court in refusing to sustain said plea to said indictment was error and movant here and now assigns said ruling as error for the reasons stated.

Ground 12. Because the decision of the court in overruling the motion to quash the whole Petit Jury panel because negroes were systematically excluded, because of race, was contrary to all the evidence offered in support of the said motion, to wit:

"Now comes the defendant in the above-stated case as the panel of the Jurors empaneled to try him is put upon him, and after demanding a full panel of (48) traverse jurors as required by law and before proceeding to trial, files this his motion to quash the traverse jury panel and shows:

1. That Negroes were wrongfully, unlawfully, intentionally and systematically excluded from the traverse jury panel of the January Term of Fulton County Superior Court, in direct violation of the 14th Amendment to the Constitution of the United States.

11. That the traverse jury panel was not legally convoked as required by the law of the State of Georgia, and of the United States.

Wherefore, the accused demands a fair and proper jury for each and all the reasons herein above set forth and contends that this panel should be quashed."

The movant offered evidence as follows in support of said motion, to wit:

. . . . . .

[fol. 66] Movant contends that the foregoing evidence established the following facts:

1. That a system is used by the jury commission in selecting petit jurors whereby names of Negro men and names of white men can be distinguished.

2. Negroes have been on the petit jury on a few occasions within 16 years or more.

3. That about one-third of the population are Negroes.

4. That about one-fifth of the taxpayers are Negroes.

5. That is a minimum of 18,000 in the Fulton County petit jury box.

6. That a prima facie case that Negroes are systematically excluded from the petit jury because of race was made.

7. That the evidence offered in support of motion was admissible beyond doubt.

8. That the State offered no evidence to disprove that Negroes were excluded from petit jury service because of race.

Movant states that the ruling of the court in refusing to quash said petit jury panel was error and herein assigns said ruling as error for the reasons stated:

Ground 13. Because the court erred in refusing to allow R. L. Craddock, a witness for movant in support of the [fol. 67] motion to quash the indictment, while on the stand, to answer the following pertinent questions asked by movant's counsel;

"Have you ever been called for jury service by the Federal Court of this district?"

That said witness would have answered the question in the positive (yes).

That the prosecution (State) objected to the question and answer as irrelevant and immaterial.

That the court ruled out the question and answer. The court was informed that movant intended to prove there are Negroes of this county that have served as jurors in

the Federal Court in this district and the Federal Court covers a much wider geographical area than the county.

That the witness testifying was R. L. Craddock.

Movant contends that the exclusion of said question and answer was hurtful and prejudicial to movant for the following reasons:

That the movant was not allowed to prove there were Negroes qualified for the grand jury service in Fulton County, Georgia; but who had never been called. And that movant was not allowed to prove that witness R. L. Craddock was qualified for grand jury service in Fulton County.

The admissibility of the evidence was beyond doubt.

Ground 14. Because the Court erred in charging the jury as follows:

"The law says this: 'Insurrection shall consist in any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence.' That, gentlemen, is what inciting insurrection means."

Movant contends that said charge was erroneous and not sound as a principle of law.

Movant contends that said charge was not a definition of "inciting insurrection," but the same was a definition of insurrection; that the said charge was argumentative in [fol. 68] that it assumed that "Inciting insurrection" and "insurrection" were identical; that the said charge makes no application to the facts but is misleading and confusing to the jury, there being no evidence either of "insurrection" or "inciting insurrection" at the trial of said case.

Movant contends that the court failed to charge the jury relative to the method or means by which it should, if it saw fit to do so, arrive at the determination of the meaning of the phrase "combined resistance to the lawful authority of the State," that the said phrase was technical and a conclusion and that the jury was misled and confused by its meaning.

Ground 15. Because the court erred in charging the jury as follows:

"I charge you, gentlemen of the jury, that mere possession of literature insurrectionary in its nature on the part of the accused wouldn't warrant a conviction in this case,

nor would engaging in academic or philosophic discussions of abstract principles of economics or politics or other subjects however radical or revolutionary in their nature."

Movant contends that the said charge was prejudicial and argumentative for the reason that it assumes that the literature introduced in evidence was insurrectionary when the jury itself was the judge of whether or not the same was insurrectionary.

Movant contends that said charge was prejudicial to the defendant in that it expresses an opinion on the facts by intimating that the said literature was insurrectionary, at the same time failing to give due account to the legal effect of the evidence in favor of the movant.

That it was confusing to the jury.

That it was misleading to the jury.

That it was also erroneous for the following reason:

That the same was not applicable to the facts or evidence adduced upon the trial of said case.

That the Court failed to instruct the jury as to the definition of "academic or philosophic discussions, abstract principles of economics or politics or other subjects however radical or revolutionary."

That the said charge was argumentative, erroneous and prejudicial to the movant in that the same was not applica- [fol. 69] ble to the facts or evidence adduced in the trial of this case, there being no evidence disclosing any "academic or philosophic discussions of abstract principles of economics or politics or other subjects, however radical or revolutionary in their nature," but that the said charge intimated to the jury that such evidence had been adduced at the trial of said case and such intimation was prejudicial to the movant in that the same tended to confound mislead and confuse the minds of the jury upon the actual facts and evidence adduced at said trial.

That the said charge was argumentative in that it stated the contention of the States that the literature was "insurrectionary, radical and revolutionary" with too much emphasis and without stating the contention of the defendant with equal force, thereby injuring the movant's case on a material point and without giving the jury any basis of determining whether the literature was insurrectionary.

That the court failed to charge the jury relative to the method and means by which it should, if it saw fit to do so,

arrive at the determination of the meaning of "revolutionary," "radical" or "insurrectionary."

That the court failed to charge the jury relative to the distinction between "Radical" or "revolutionary" and in so charging the jury did use the terms "radical" "revolutionary," or "insurrectionary" interchangeably without pointing out the differences in their meaning.

Ground 16. Because the court erred in charging the jury as follows:

"Now, gentlemen, I charge you that advocacy, however reprehensible morally, is not sufficient to convict the defendant where there is no evidence to indicate that the advocacy would be acted upon immediately. In order to convict defendant, gentlemen, it must appear clearly by the evidence that immediately serious violence against the State of Georgia was to be expected or was advocated."

Movant avers that such charge was erroneous and injurious to him because:

[fol. 70] It was argumentative in that the court intimated that the fact of advocacy had been proved and such intimation was prejudicial, there being no evidence of advocacy either in acts or intention, in connection with the facts constituting the basis of the prosecution of this case; such intimation was an expression of opinion on the facts by suggesting to jury what had or had not been proven.

That it was confusing to the jury.

That it was misleading to the jury.

That it was also erroneous for the following reasons:

That said instructions were erroneous and illegal because the same were not applicable to the facts or evidence adduced upon the trial of said case, there being no evidence whatever disclosing any advocacy on the part of the movant, and that said charge fails to disclose and point out what the term "advocacy" is addressed and referable to. The said charge was prejudicial in that it stated the contention of the State with too much emphasis.

That the said charge was argumentative in that it did intimate to the jury that Movant had advocated insurrection and that the alleged advocacy of movant was "reprehensible morally" and that said intimation was harmful to movant on a material point.

That the said charge was argumentative in that it overstated the contentions of the State without laying equal emphasis upon the contentions of movant.

Ground 17. Because the court erred in charging the jury as follows:

"I charge you, gentlemen, that an attempt to commit an act which is, in fact, a crime is not complete unless the alleged crime is dangerously near completion; that the mere possession of radical literature, as I have before stated, alone is not sufficient to constitute the crime of attempting to incite insurrection."

Movant avers that such charge was erroneous and injurious to him because:

It was argumentative in that it intimated that the literature was radical when it was exclusively within the province of the jury to determine whether said literature was in [fol. 71] fact radical and said intimation was prejudicial to the movant.

That it was also erroneous for the following reasons:

The jury was directed to pass upon questions of fact not raised by the evidence in the case.

The charge was erroneous and illegal because the same was not warranted by the facts or evidence adduced upon the trial of said case, and did in no manner point out or disclose to said jury the method or means by which it should, if it saw fit to do so, arrive at the conclusion as to whether or not the literature introduced was radical.

The said charge was erroneous and unlawful in that the court did intimate and express an opinion on the facts in the presence of the jury, contrary to law, charging on the question of "radical literature" without pointing out to the jury how they were to determine whether in fact the literature offered by the State was radical.

The said charge was erroneous and prejudicial in that it stated the contention of the State that the literature was radical with too much emphasis without stating the contentions of the movant on the same question with equal emphasis.

Movant contends that the court failed to instruct the jury as to the definition of "radical" and failed to point out to the jury just how such definition should be applied to the facts of this case.

Ground 18. Because the court erred in charging the jury as follows:

"Now, gentlemen, I charge you in this case that there is no confession and this is admitted by counsel on both sides—what is known under the law as a confession—but that under the evidence in this case, it will be a question for you to determine whether or not there were incriminatory statements made. The difference between a confession and an incriminatory statement is that a confession must relate to the whole crime in order to be a confession and must confess to every act that it takes to constitute the crime. A man can make incriminatory statements which admit some fact that would be necessary to constitute the crime, some element that would be necessary to constitute the crime [fol. 72] under the rules of law I have given you in charging this case. So you will determine, gentlemen, whether or not the defendant in this case made any incriminatory statements, that is, admitted any facts in connection with the commission of the crime, if any crime was committed, that would be a part of the total element that it would take to make up the crime as a whole, and you are to be the judges of whether or not such fact is true.

"You are the sole judges of all the facts, and the court can express no opinion, and does express no opinion as to what has or has not been proven, it is for you to determine whether or not any of these things that I have charged you upon have been proven. If incriminatory facts have been proven, if it has been proven that this defendant made incriminatory statements under the rule I have just given you in charge, why you may consider that along with the other evidence in determining whether the defendant is guilty or innocent.

"Now, gentlemen, I charge you further that if you determine that there has been an incriminatory statement or statements made in this case, there is a rule of law that all incriminatory statements or admissions should be scanned with care, and an incriminatory statement alone would not be sufficient to convict; there must be some other evidence outside of the incriminatory statement to connect the defendant with perpetration of the crime; if any was committed."

Movant contends that such charge was erroneous and injurious to him because:

It was argumentative in that the constant reference to "incriminatory statements" was an intimation and assumption that incriminatory statements by the movant had been proved and an intimation to the jury that statements made by the movant were incriminatory, while the movant contends that he made no incriminatory statements. Movant contends that the said intimation was unfavorable to the movant also for the reason that it stated the contention of the State with too much emphasis.

That it was confusing to the jury.

That it was misleading to the jury.

[fol. 73] That it was also erroneous for the following reasons:

Said charge was erroneous and illegal because it was not applicable or referable to the facts or evidence adduced upon the trial of the case, there being no evidence disclosing any incriminating statements either in the act or in the intentions of movant in connection with the acts constituting the basis of this case.

Movant avers that said charge was injurious and prejudicial in that the jury was directed to pass upon a question of fact not raised or warranted by the evidence in this case.

Movant contends that the said charge misled and confused the jury in that it directed to their consideration facts and issues which were not proved upon the trial of said case.

Ground 19. Because the court erred in charging the jury as follows:

"The object of all legal investigations is the discovery of the truth, so that you will take these rules of law I have given you in charge and apply them to the facts in this case and determine what the real truth is. You understand in this issue between the State and the defendant, the State claims this defendant is guilty of the offense of attempting to incite insurrection. Gentlemen, I have given you in charge the rules of law on that subject. The defense, on the other hand, claims that he is guilty of nothing—that he is not guilty of attempting to incite insurrection. The State has

set out in the indictment the manner in which the State contends he did attempt to incite insurrection. The defendant, as I have said, comes along and says he is not guilty, that he did not attempt to incite insurrection, and that he is guilty of no offense at all. Well that raises a clear-cut issue of fact for this jury to determine under the evidence in the case and under the rules of law that I have given you in charge."

Movant avers that such charge was erroneous and injurious to him because:

It was misleading in that it failed to point out what issue of fact the jury was to determine in the case to wit, whether the movant was guilty of any offense at all or whether he [fol. 74] was guilty of the offense of attempting to incite insurrection.

The said charge was an intimation to the jury that while the defendant may not have been guilty of the crime for which he was indicted, he must have perforce been guilty of some crime, which intimation existed when the court stated that the defendant contended he was guilty of nothing the said intimation was unfavorable to the movant.

Movant contends that said charge was erroneous and illegal in that the same was not applicable to the facts or evidence adduced upon the trial of said case, it not being the issue whether the defendant was guilty of no offense at all.

Movant avers further that the court erred in giving such charge.

Ground 20. Because the court erred in charging the jury as follows:

"Now, gentlemen, on the question of what was the intention of the accused at the time of the alleged acts set forth in this indictment, if any such acts have been shown by the evidence in this case, you look to all the evidence and the defendant's statement and determine from those sources what was his intention at the time such acts were committed, if you believe from the evidence in this case any such acts were committed."

Movant contends that said charges were erroneous and illegal because the same were not applicable to the facts or evidence adduced upon the trial of said case, there being

no evidence disclosing any acts on the part of movant, in connection with the facts constituting the basis of this prosecution.

Movant further avers that said charges was erroneous and injurious and was prejudicial to movant in that the jury was directed to pass upon a question of facts not raised by the evidence in the case.

Movant contends that the said charge was erroneous and unfavorable to the movant in that the said charge was an intimation of opinion on the facts that the charge intimated that the movant had committed acts and did have intentions which tended to prove that he was guilty of the crime for which he was indicted in the trial of this case.

[fol. 75] Ground 21. Because the court erred in refusing to give the following request to charge:

"That all evidence on the Foster-Ford Clubs be excluded from consideration by the jury, since the Communist Party, in this State is a legal party and therefore entitled to existence in this State." Said charge being pertinent and applicable to the facts of the case, and movant having submitted such request to charge in writing before the jury retired to consider their verdict.

Movant avers:

That said written request to charge was accurate and sound as a proportion of law.

That the request was not covered or substantially covered by the general charge; and the written request was peculiarly appropriate to the facts of the case and would have materially aided jury in its determination, for the following reasons:

It would have enabled the jury to eliminate from their consideration evidence which was the literature of a recognized party which was legal in the State of Georgia. The court having taken judicial notice of the fact that the Communist Party was a legal party in the State of Georgia and was on the ballot in the last presidential election, the above requested charge was peculiarly appropriate to point out to the jury how all evidence with regard to Foster and Ford as presidential and vice-presidential candidates should exclude from their consideration on the question of movant's guilt of the crime for which he was tried.

The particular matter in issue to which the written request to charge was particularly adjusted was: That the literature of a recognized legal party and its lawful candidates in the State of Georgia, should not have been considered in the determination of the guilt or innocence of movant for the crime for which he was indicted, and the refusal to so charge was prejudicial and harmful to movant, for the following reasons:

It permitted the jury to consider in its determination evidence against movant which was entirely legal, and which [fol. 76] was immaterial and irrelevant to the question as to whether or not defendant was guilty of the crime for which he was indicted.

Ground 22. Because the court erred in refusing to give the following request to charge:

"That there is a wide difference between demonstration and insurrection." "Demonstration" is the public exhibition of one's sympathy towards a social or political movement. "Insurrection" is resistance with force against the lawful authority of the State of Georgia," said charge being pertinent and applicable to the facts of the case, and movant having submitted such request to charge in writing before the jury retired to consider their verdict.

That said written request to charge was accurate and sound as a proposition of law.

That the request was not covered or substantially covered by the general charge and the written request was peculiarly appropriate to the facts of the case, and would have materially aided the jury in its determination, for the reason that evidence of a demonstration was adduced at the trial of said case, and the vital distinction between "Attempting to incite insurrection," "insurrection," and "demonstration" would have been pointed out to the jury in order to eliminate the confusion of these issues in the minds of the jury.

The particular matter in issue to which the written request to charge was particularly adjusted was whether or not a "demonstration" was the same as "insurrection" or an "attempt to incite insurrection" and the refusal to so charge was prejudicial and harmful to movant, for the reason that the jury tended to consider a "demonstration" identical with "insurrection" and "attempting to incite insurrection," and based their finding on the "demonstra-

tion" which is not lawful and which is widely different from "insurrection" and "attempting to incite insurrection."

Ground 23. Because the witness, E. A. Stephens, while testifying as a witness in behalf of the State, on direct examination and in response to questions propounded by [fol. 77] counsel for the State, used the following language to wit:

"I called on the Chief of Police to have that box watched and the man who got the mail out of there taken in charge and questioned; the same day, Officer Watson or Mr. W. B. Martin, I don't recollect which, brought this darkey, Angelo Herndon, to the solicitor's office, and I talked to him in the grand jury room."

Counsel for the defendant objected to the use of said expression "darkey" by the witness, on the ground that said word "darkey," as used, was a term of opprobrium and highly prejudicial to the defendant. The court, in response to said objection, stated: "I don't know whether it is or not; but suppose you refer to him as the defendant."

Movant insists that the use of said term "darkey" by the witness, himself an assistant to the solicitor general, was highly prejudicial to the defendant, in that it accentuated in the minds of the jurors the fact that defendant was a member of the colored race, thereby further injecting into said case the question of race prejudice, said word "darkey" as applied to members of the colored race, denoting contempt, scorn, ridicule and the like. The court failed to admonish the jury to disregard the use of said "darkey," and the harmful and the prejudicial effect of the use of said term had become fixed in the minds of the jurors and thereby prevented this defendant from having a fair trial. And movant insists that for all the reasons stated a new trial should be granted him in the premises.

Ground 24. Because the court erred in permitting the assistant solicitor general, E. A. Stephens, a witness for the State, to refer to movant as "darkey" over the objection of counsel for movant; to wit:

"Officer Watson or Mr. W. B. Martin, I don't recollect which, brought this darkey, Angelo Herndon, to the solicitor's office and I talked to him in the grand jury room."

Movant objected to the use of the term "darkey" at the time such reference was made, urging as grounds of objection the following:

[fol. 78] "Mr. Stephens refers to the defendant as 'darkey.' Your Honor, we wish to remind the prosecution if they insist on using such opprobrious terms of the defendant, we will have to ask for a mistrial because it is prejudicial to our case."

The court made no ruling as to whether the use of the term "darkey" was opprobrious or prejudicial, saying: "I don't know whether it is or not; but suppose you refer to him as the defendant."

Movant insists that permitting the State's witness to refer to the defendant as "darkey" was harmful and prejudicial to movant's case, because the term "darkey" as thus used, is a term of contempt and scorn and inferiority and is commonly and customarily regarded as such. Movant further insists that the use of the term "darkey" over the objection of movant, created and communicated to the jury an atmosphere of prejudice, thereby preventing to defendant a fair and impartial trial, and was and is unto movant a denial to him of the equal protection of the laws, as guaranteed him by the Fourteenth Amendment to the Constitution of the United States, Section 1, which reads as follows:

"Article XIV. Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Movant insists that the failure of the court to admonish and instruct the jury in regard to the use and effect of the term "darkey" by the said witness was highly prejudicial to the defendant and prevented his receiving, and he did not receive a fair and impartial trial on account of the atmosphere created against him by the witness, and defendant insists that he was, therefore, wrongfully and illegally con-

victed in said case. Movant further insists that the failure of the court to take appropriate action upon the use of said term "darkey" by the witness in designating this defend- [fol. 79] ant was error; that the language employed by the court, to-wit: "I don't know whether it is or not," implied a doubt upon the mind of the court which found its lodgment in the minds of the jurors and thus further prevented defendant from receiving a fair and impartial trial by a jury of his peers. And movant says the ruling of the court in the premises was error and that a new trial should be granted him in the premises.

Ground 25. Because the court erred in refusing to allow movant's counsel to ask the jurors individually and severally on the voir dire on the trial of said case to propound the following pertinent questions:

"Have you any prejudice against the defendant because he is colored, which would prevent you from arriving at a verdict on the trial of this case?"

Movant stated in his place to the court that if prospective jurors on their voir dire had been permitted to answer the said question, defendant would have been able better to avail himself of his constitutional right to select a fair and impartial jury for the trial of said case. The court refused to permit said question to be asked of said prospective jurors on their voir dire on the ground that the laws of the State of Georgia prohibited or made no provision for such question to be asked severally and individually, but the court allowed on movant's *on* motion said question to be propounded to the prospective jurors in groups of twelve as they were impanelled in the jury box. Movant insists that the refusal of the court to permit such question to be asked was prejudicial to movant, for the reason that movant did not have due opportunity to avail himself of his constitutional right to select a fair and impartial jury and because said refusal was and is a denial unto the defendant of equal protection of the laws and a denial unto him of the due process of law as guaranteed unto him by the Fourteenth Amendment to the Constitution of the United States, Section 1, which reads as follows:

"Article XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein [fol. 80] they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Movant insists that the refusal of the court to permit said question to be propounded to such prospective jurors on their voir dire was highly prejudicial and harmful to the defendant and prevented his receiving and he did not receive at the hands of said jurors a fair and impartial trial and he says that he has been wrongfully and illegally convicted on account thereof. Movant insists that the refusal of the court to permit said question to be propounded was error and movant here assigns the same as such.

Wherefore, movant prays that these his grounds of new trial be inquired of by the court and that a new trial be granted him in the premises.

John H. Geer, Benjamin J. Davis, Jr., Attorneys for Movant.

The recital of facts contained in the foregoing amendment to and of the original motion for a new trial is hereby approved as true and correct and all of the grounds of the amendment are approved; and the amendment is hereby allowed.

This 5th day of July, 1933.

L. B. Wyatt, Judge of the Superior Courts, Fulton County, Judge Coweta Circuit, presiding.

[File endorsement omitted.]

IN SUPERIOR COURT OF FULTON COUNTY

ORDER OVERRULING MOTION FOR NEW TRIAL

The motion for a new trial in the within and foregoing referred to case coming on regularly to be heard on June 24th, 1933, after hearing argument, and after taking the case under consideration until this date, it is ordered, con-

[fol. 81] sidered and adjudged that the motion for new trial be and same is hereby overruled and a new trial denied.

This July 5th, 1933.

L. B. Wyatt, Judge Superior Court, Coweta Circuit, presiding.

[fol. 82] In Superior Court of Fulton County

No. 37,812

The State of Georgia

vs.

Angelo Herndon

Attempt to Incite Insurrection. Trial Jany. 16, 17, 18, 19, 1933; Before Judge L. B. Wyatt, Presiding, and a Jury

Brief of the Evidence—Filed July 6, 1933

The following evidence was delivered not in the presence of the jury, but on the hearing of the motion to quash the indictment:

Oscar Palmour, sworn in support of motion to quash, testified:

I am a member of the Jury Commissioners of Fulton County, Georgia. I think I am acquainted with the system whereby Grand Jurors names are selected for the Grand Jury box; that system is, first, that all of the taxpayers in the tax-payers lists, we take all of those and go over each one individually and call out the name of a man whom we feel is suitable for jury duty, and then we'll ask the commissioners, "One list or two?" If anybody says "Two lists," he is entered only for the petit jury; if some member raises the question he is suitable for two lists, we star that and he goes on the list for the grand jury; that's true with regard to tax-payers, regardless of whether they are white or black, every man who gives in tax at all, we review it from the official tax-payers list. If we find out that one particular person is suitable for both 1 and 2, we star his name for the double list. We can tell whether

a man is a black tax-payer or a white tax-payer; the tax returns are in typewriting and marked colored or marked white; as to how the Jury Commissioners dispose of the tickets with negroes' names on them, we'll suppose it is a negro tax-payer, John Jones; somebody will say "One list," probably he knows something about it; if nobody suggests a double list, he isn't starred, and therefore couldn't go on the Grand Jury; in fact the general rule is one or two members of the Commission must be acquainted personally with the character and habits of the man selected for the Grand Jury, one or two of the commissioners are supposed to be personally acquainted with the character of that man. They are not personally acquainted [fol. 83] with all of the white men selected for the grand jury, but supposed to be, as nearly as possible, one or two; as a matter of fact, they couldn't be acquainted with four thousand men, all of them. As to how I account for the fact that no negroes names are starred for the grand jury I can answer pretty well in regard to my own district. I have worked with the negroes in my own district, in Liberty Loan campaigns, and known them pretty well, of course. I suggest a good many names to go on the petit jury, but not a single one that I could feel would come up to my requirements for the grand jury; if you'll read the law as to the qualifications of the grand jury, you can see why, I will say though, there has never been a single man kept off on my vote because he is colored—not a single one. In my opinion there hasn't been a single one that has come up to the requirements of the grand jury, that I know of. I don't remember how long I have been a member of the jury commission—the records will show. Since I have been a member of the jury commission, as to whether I can remember any time during which a negro was selected as a grand juror in this county, the fact is I have paid no attention to it at all. I don't know whether or not the members of the jury commissioners have ever starred a negro's name in such a way that it would be placed in the grand jury box; the actual fact is, I didn't know until somebody called my attention to it that there was no negroes in the grand jury, until somebody called my attention that there wasn't any in the box. As to whether it is my business to see that taxpayers' names are chosen for grand jury, the fact that I am a sworn officer, I have to use my own judgment as to that; there are plenty of qualified tax-

payers that are not qualified for grand jurors; some of the biggest taxpayers here couldn't possibly get on the grand jury. I do testify that the reason I haven't selected any negroes' names as a grand juror is because of the fact that there isn't a single one, in my opinion, that comes up to the requirements, except those professional men excused by law. I fear that all the white men selected would not come up to the highest standard, that would be asking too much. We have something over 18,000 jurors in the traverse box; in this particular county we have about 4,000 grand jurors. When we go to make up the grand jury from [fol. 84] the traverse jury, I am familiar with the law by which we select them—the most upright men serve as grand jurors—as a jury commissioner I have done my best to do that.

The proportion of negroes in this county so far as the population is concerned to the white, as a rough guess, I would say is about one-third. The number of names selected for grand jury is 4,000 required by law; it is something more than 4,000, I guess about 4,200.

A. S. Nance, sworn in support of the motion, testified:

I am a member of the jury commissioners of Fulton County. I am familiar with the system whereby names are selected for grand jury service; that system is: The jury commissioners select their list of traverse jurors—petit jurors, as we call it—from the tax returns made in the office of tax receivers, and from the list we then select a grand jury list, on that list there are a little bit better than 18,000 names in the petit jury, and about 4,100 or 4,200 in the grand jury. As a jury commissioner, I can tell whose names are colored and whose names are white, at the time the list is compiled. In starring and drawing names for grand jury service, jurors are not selected according to race, and they are not excluded according to race. I have been a member of the jury commission about eighteen months; no negro has ever been on the grand jury since I have been a member of the jury commissioners, to my knowledge. In the last eighteen months there has not been a system that is used by the jury commissioner which prevents or prohibits negroes' names being selected as a grand juror; in the past eighteen months there has been

none selected because there has been no member of the jury commission who was willing to recommend any of his acquaintance from the petit jury to the grand jury; it is not that he isn't willing to recommend them because they are black. I could only answer for myself; the ones I know that I feel are competent, experienced and qualified for grand jury service are either professional men or in the service of the Government or the State, which would exclude them; in the main, the men's names selected for the grand jury are supposed to be vouched for according to [fol. 85] the personal opinion of the jury commissioners; some of the six commissioners know practically all of the people in the grand-jury box, not all, I say practically all, one or more of the six commissioners. The probable ratio of whites to colored in Fulton County, so far as population is concerned, I think roughly would run about two to one, something like that; as to tax returns, the colored ratio there would be about one to five; we have never had but one out of five grand jurors negroes, since I have been on the jury commission; I have been a jury commissioner since 1931, about eighteen months. There are negroes' names in the traverse box. There is a minimum in our county of 4,000 grand jurors. I am familiar with the law that requires the most intelligent, upright citizens, and I have done that. I have done my duty to the best of my ability as a jury commissioner.

George H. Sims, sworn in support of the motion, testified:

I am a member of the jury commissioners of Fulton County, and have been a member about twenty years. During the twenty years I have been a member of the jury commissioners of this county, I do not recollect a negro serving on the grand jury. The system whereby names are drawn for the grand jury has not changed from the time I was first a member of the commissioners, twenty years ago, down to date, that I know of; the method whereby grand jurors are selected by the jury commissioners, we go to the tax digest and select jurors, the petit jury first, and then if we think there is a man good for the two lists, we cross that name and the stenographer under-

stands what that means, that is, for the two lists. We get out lists from the tax returns; when those names come to us, we can tell which are the names of black men and which are the names of white men; they have separate tax returns, and when we list those names down as possibilities for jury service, we keep them separate so that we know which is colored and which is white, and give them to the clerk of court. We have not, to my knowledge, chosen any names that are black for grand jury service. The ratio of population in this county, between whites and colored, as to tax returns, I wouldn't think it was over one-fourth; I never did take the trouble to count them. I [fol. 86] have been on the jury commissioners approximately twenty years, and to my knowledge, a negro has never served as a grand juror.

Cross-examination:

No negroes have ever been excluded from the grand jury list or kept off, because of their race.

Redirect examination:

As to why negroes' names have not been on the grand jury service list for the twenty years that I have been on the jury commissioners, one or more of the jury commissioners are supposed to know the man, his standing, before he is selected for the two lists.

I know some negroes that could qualify but they are exempt, professional men and such. I do not know of any men who are not exempt from grand jury service, who are qualified.

F. J. Paxon, sworn in support of the motion, testified:

I am a member of the jury commissioners of Fulton County, and have been a member, to my best knowledge and belief, about four years; I am acquainted with the system whereby jurors' names are selected for grand jury service and petit service; they are sworn by the judge of the superior court, what our duties are, that system is: We have given to us all the tax returns of property owners in Fulton County—later the other two counties that came in, Milton and Campbell—and from that we are instructed to

select at least 18,000 petit jurors, as we call it, from that list, and about 4,000 grand jurors. There is a system whereby we know whose names are colored and whose names are white. Since the time I have been on the jury commissioners in this county, I do not recollect any negro having been selected for grand jury service, that I know of. Negroes' names are not intentionally excluded from the grand jury list; if you will read the law in which the jury commissioners are chargeable, we are charged to pick out the most intelligent and best qualified citizens for grand jurors, and we pick out the most intelligent and the best qualified white citizens, for grand jury service, as far as we can. I presume there are negroes who are sufficiently intelligent and upright to be members of the grand jury, I couldn't answer as to that; I couldn't answer categori- [fol. 87] cally whether there are any negroes in my personal acquaintance who would be sufficiently intelligent and upright, so far as standards are concerned, to serve on the grand jury, for this reason—as you are aware, the grand jurors are supposed to be men before whom the man is to be tried and charges to be brought to him; therefore, it is charged to us to pick out what we consider the most intelligent, the best qualified, to pass on certain cases as grand jurors; now, if you have 18,000 names or more, or 20,000, whatever the number is, you have some difficulty in picking out 4,000; we have to eliminate any number of white men; if there is "A," "B," "C" and "D" and we think "D" is best qualified for a grand juror, we put him in the box; it is no reflection on "A," "B" or "C." To my knowledge we have never selected a negro for grand jury service, as far as I know. I have no idea what the ratio of population is in this county for negroes and whites, excepting I have heard Mr. Palmour and Nance state; I don't know whether it is true or not. I couldn't tell you.

Cross-examination:

I have never in my life excluded intentionally negroes from the grand jury box because of their race. I think the commissioners accept their responsibility very seriously. I have not excluded them because of their race, absolutely not, nor a Chinaman, or some other color.

Redirect examination:

I do not know of any reason, any fact, as to why negroes are not selected, except I am telling you, if we have a list of 18,000 or 20,000 names, we are supposed under our oath to pick out those that are best qualified for grand jurors.

A. Gordon Hardy, sworn in support of the motion, testified:

I am Chief Deputy Sheriff of the criminal division of the Superior Court. I have had that position a little over sixteen years. I have never known in my sixteen years of service here a negro to serve on the grand jury. I do not attend the grand jury; it is under my charge but I have a special bailiff to be there; some of the special bailiffs are Mr. Gaines, Thompson and C. C. House. It isn't possible for me in my official capacity to know whether the grand jury is black and white, only just by seeing them, and all [fol. 88] the time I have been seeing them I have never seen a negro grand juror. I attend the petit jury. I am acquainted with the composition of the petit jury, and have been acquainted with this for sixteen years, as I have with the grand jury. I know of negroes being on the petit jury on a few occasions; it has been several years ago, I recollect one being called and he was excused; it has been three or four years ago. I do not think the proportion of the population of negroes and whites of this county would be over one-fourth, that would be my guess. I was trying to recall the year of a negro being summoned and got excused; we have had some since, a week or two ago, I believe—since Christmas; that's the petit jury.

R. B. Gaines, sworn in support of the motion, testified:

I am a deputy sheriff of Fulton County, and attend the grand jury, I have had the job of attending the grand jury about fourteen or fifteen years—I'll say fourteen years. I don't recollect a negro ever being on the grand jury. I have no idea what the proportion of the tax returns is.

JUDGE E. D. THOMAS, sworn in support of the motion, testified:

I seem to have a drawn the grand jury for the July term, and drew them on the 14th day of June, 1932. There was not any way at the time I drew the July grand jury panel that I could tell whether the members were colored or white, or the names were colored or white; all the names I drew out of the grand jury box were the same colored slips and I simply called the names from the slips as I got them out. I had nothing to do with the composition of the names inside of the grand jury box.

W. S. RICHARDSON, sworn in support of the motion, testified:

I am a tax collector and ex-officio sheriff of this county. I do not compile the list- which are sent to the jury commissioners for the selection of names for the grand jury; the lists are provided, as I understand, by the jury commissioners themselves; the lists we get the names from are made — the tax receiver; I am tax collector, I have held my office here 12 years. I do not know of my own knowledge of any instance where a negro was on the grand jury, or on the other jury, as far as I know, because I have got no [fol. 89] knowledge or any connection with the jury matters.

J. W. SIMMONS, sworn in support of the motion, testified:

I have been Clerk of Fulton Superior Court since 1930. No negro has served on the grand jury since I have been here; I am Clerk of the Jury Commissioners; I do not serve with them; as Clerk I do all the clerical work, have the list typed and printed and the books arranged. In doing the clerical work I can tell from looking at the book and records just whose names are colored and whose white; the jury lists are made up from the original tax returns, not from the digest but from the original returns signed by the person who made the return, and they are on different colored paper. I don't know what color of paper, I am not an authority on colors; I think they are yellow—well, I am not

sure of that; the tax receiver is required also by statute to send to the comptroller general a statement, a list, of all the returns made by colored people—Code Section 1116. I have there all the names selected, all of the 4,200 or 4,000 names selected for grand jury service; I can tell whether they are white or colored. I know they are white; I have never seen any colored at all, in the grand jury.

Fred McSwain, sworn in support of the motion, testified:

I was foreman of the grand jury for last July term; there were not any negroes on that grand jury, or members of any other race on that grand jury than the white race.

Guy A. Moore, sworn in support of the motion, testified:

I am receiver of tax returns of Fulton County, and have been since January 1. I was a deputy in the receiver's office from 1920 until 1928. I am acquainted pretty much with the system whereby tax returns are sent to the jury commissioners; the tax returns are made, and after they are transcribed on the digest they are tied in bundles; the jury commissioners send down and get those in alphabetical order, carry them up in one of the rooms upstairs, and from that the jury lists are compiled. I give them the original returns. The number of returns I send up to the jury commissioners vary in the years, I would say between 58,000 and 60,000. I am absolutely able to tell in these bundles [fol. 90] of tax returns which names are names of colored and which names are names of whites. As to whether since I have been a deputy tax receiver and tax receiver, I know of no negroes ever serving on the grand jury, I am not familiar with any of the Grand Juries, and never was in the grand jury room, that I recollect, but one time. After the jury commissioners finish their use of the tax return, they come back to my office, in the same order in which I sent them out. I never looked at those returns after they came back; we then send them to the tax collector's office and he has them bound in books, and we never look at them again. For the time I have been deputy tax

receiver, to give you the approximate proportion of tax returns between white and colored in this county, that would be a guess; I could find that out in a few minutes, but I would say, something like about one-sixth, but that's a guess; it might be one-seventh or one-eighth, I don't know just how long it would take me to find out, but I would say, between one-sixth and one-seventh, one-sixth would be about right, and I can tell you how I know, because we make up these books; there are four large books of city whites and one book of negroes, which is not nearly so large as the others, so I would say, it is about one-sixth, that if, for the city and the same proportion would obtain in the county, I believe.

The following evidence was delivered not in the presence of the jury but on the hearing of the motion to quash the traverse jury panel.

Hearing On Traverse Jury

Oscar Palmour, sworn in support of the motion, testified:

I am a member of the jury commissioners. I am acquainted with the system whereby petit jurors are selected. The jury commissioners place the names of the petit jurors in the jury box after they are printed; they are not all printed on the same color of paper, the different colors of paper are white and something like that (indicating a manilla envelope), probably white and light yellow. The returns come in on different types of paper, and then the lists are printed on different types, so that it is exclusively two types. We place in the box the names of both colored and white, on different types of paper; we put in the jury [fol. 91] box the colors of paper handed to us printed; we have nothing on earth to do with the contract of printing; when we make them out they are made out on long sheets, and we don't see that any more until we come down and stuff the box, and I know absolutely there are two colors of papers, and the jury commission has nothing to do with printing them; as I say, there are two colors of paper—I never looked at any of it—there are two colors of papers that go in the box; I would hate to say it is true that the colors of paper conform to the differences, to the distinc-

tions, as received on the tax return; I presume that is true, but I haven't checked it to see; the tax returns come on separate types of paper; it is not my duty to know just how that system is, whether or not they have colored on one color of slip, and white on another, exclusively. I don't know whether negroes have served on the petit jury since I have been a member of the jury commission in this county.

GEORGE H. SIMS, sworn in support of the motion, testified:

I have been a member of the jury commissioners for approximately 20 years. I am acquainted with the system whereby names are selected for petit jury service. To describe that system, we have the original returns for the white and select from that and the original returns from the colored, and select jurors from the colored people, and turn them over to the clerk, the names, and he has them printed. We are able to discern which names are the names of whites and which names are the names of colored, on our jury slips, different color of papers, I'm not good on colors, but one is a kinder yellow sheet—you can distinguish the colors all right—one is a light pink, maybe, and we would know that by the color of the slip that that was the name of a negro, and by selecting the other, we would see the name of a white, and those names are put in the petit jury box as such; they are all mixed up and put in together; something like 18,000 names in all are put in the petit jury box, there may be more; I presume the box has that many names in it when it is brought up to the judge for his selection, for the purpose of drawing; we put them in there and seal them, and nobody else can open it except [fol. 92] the judge, that is my understanding. I couldn't tell you what proportion of that 18,000 contains the names of negro men; it would be just a rough guess. The Jury Commission does not attempt by any system of proportion to choose so many white names, and then, on the other hand, to choose so many black names. I think, from the original return they select the names, but what is the proportion I couldn't say. I have heard of a few negroes who have served on the petit jury since I have been a jury commissioner; I don't know.

A. Gordon Hardy, sworn in support of the motion, testified:

I am Chief Deputy Sheriff of the Criminal Division of the Superior Court, and have held that position a little over 16 years. I have never known in my 16 years of service here a negro to serve on the grand jury. I am acquainted with the composition of the petit jury, and have been acquainted with it for 16 years, as I have the grand jury composition. I know of negroes being on the petit jury on a few occasions, I can't recollect what occasion those were, it has been several years ago; I recollect one being called and he was excused; it has been three or four years ago. I do not think the proportion of the population of negroes and whites of this county would be over one-fourth; that would be my guess; I was trying to recollect the year of a negro being summoned and got excused; we have had some since—a week or two ago I believe, since Christmas; that's the petit jury.

A. S. Nance, sworn in support of the motion, testified:

I am a member of the jury commissioners. The system of selecting petit jurors is this: We take the original returns from the tax receiver and compile the petit jury from the returns; the white returns are on white paper, the colored returns are on manilla paper, supplied by the State Comptroller and the tax receiver; the returns are made on that paper and transferred to us for compiling the jury list from the original returns and the original oath signed by the taxpayer; we put all of these names on these different colored slips into the petit jury box; I have no idea what the proportion of colored names is to white names. As to what is the average number of colored that's put in there, in the petit jury box, my answer wouldn't give [fol. 93] you the answer, I don't think, that you want, because we only revised the list complete one time since I have been on the commission, so I don't think I could give you an average from one compiling. When the list is revised, there is a way to tell just what names are colored and what names are white, upon the revision of the jury list; I couldn't give you the percentage or proportions on the revised jury list, I know at the last compiling I recom-

mended personally some eight or nine colored men for jury service on the petit jury, but I couldn't give you the total number of colored jurors. I think my colleagues selected those names that I selected; several of the other members would recommend colored men that myself or the other members would know; in other words, the selection is made this way: We take the tax returns with a copy—they are different colored—and go through it, and where myself or any of the other commissioners know the man in question and can vouch for him, he is selected; when those negroes that I recommend to my colleagues are actually selected by my colleagues, the names are first typewritten and then printed, the names are all printed; in other words, where they have been recommended by colleagues of mine, it is known they are negroes and they are put into the jury box along with all the rest of the jury names; the jury commissioners put the names, between 18,000 and 19,000 names in the jury box, and these boxes are sealed and turned over to the clerk of the court, who supplies them to the judges at the beginning of each term; in other words, the custody of the boxes is in the hands of the clerk of the court; the custody of the boxes goes from the commissioners to the clerk, and from the clerk to the judge. I don't believe I have ever been present at a drawing of a petit jury by one of the judges. I have no personal knowledge of what process goes on when the judge actually draws a petit jury. In the handling of the names that are to be used in petit jury service, there is a system whereby you can determine whose names are black and whose names are white, until they leave the hands of the jury commissioners.

[fol. 94] Cross-examination:

The jury commission doesn't exclude any negro from the petit box because of their race, I don't think I have ever had any colored citizens complain about being taken out of the jury box. I have had dozens of white citizens complain about being taken out, but the names are not removed from the box.

F. J. Paxon, sworn in support of the motion, testified:

I am a member of the jury commissioners of Fulton County. As to the system whereby petit jurors' names are put into the jury box, as I said before in the previous tes-

timony, the tax returns are turned over to the six jury commissioners, with the oath administered by one of the Superior Court judges what we are to do; it comes to us, we go over each and every tax return and pick out from the number, whatever it is, forty or fifty thousand, certain numbers that we think would be reputable traverse—you call petit—jurors, and a typewriter there, a young lady, runs off the names as we give them to her, and when we are through they are turned over to Mr. Simmons, as clerk, and he turns them over to the printer; the printer prints them in two colors, one white and the other pink or yellow—some distinctive color, and then we are present when they are cut and dumped into the jury box, and those boxes are sealed by us and we certify to it and they are turned back to the clerk of the court, Mr. Simmons, and that's all we have got to do with them; our job is finished. The jury commissioners do not determine the color of the slips to be printed; that is determined by the State, but as to what particular agency of the State determines that, I have no more idea than a jack rabbit. As to whether I have of my own personal knowledge ever recommended any negroes for petit jury service by placing those negroes' names in the petit jury box, I will answer you this, that I don't believe individually I ever have—I may have; in other words, I couldn't go back through one, two, three, four years or more, and remember just what I did; very frequently, like Mr. Nance testified, and others, he will say, "Here's a reputable negro," and it has got to be unanimous before it goes into the jury box; for instance, I might make an [fol. 95] objection to a white man and tell why I objected, and if the objection is valid, we don't put him in the jury box at all, I don't remember any time that I put John Smith's in, whether he is white, colored or a Chinaman; I don't remember. I do remember different colored slips, that designate them. The selection of each name to go in the jury box must be such that it has the unanimous approval of each member. My business — in Atlanta, unfortunately for me, I am President of Davison-Paxon Company.

JOHN H. HUDSON, sworn in support of the motion, testified:

I am not acquainted with the fact as to whether or not a negro has been selected for petit jury service recently,

no more than I have known him to be drawn for jury service; my recollection is two or three negroes were drawn for petit jury service at the January term of this court, this year, and were sworn in, and my recollection is they were here the entire week. I have never in my life been present at a petit jury drawing by one of the judges of the Superior Court, or in any other court, this or any other, that I know of. I have absolutely nothing in the world to do with the making up of a jury list, printing them, putting them in the boxes or selecting the jury or anything of that kind. I don't know at the present time of any instance where a negro has served on the grand jury of this county. I don't recollect any negro serving on the grand jury at the July term of Fulton County, last year, that indicted Angelo Herndon. If my recollection serves me, I have been Assistant Solicitor here since the third day of September, 1923; during that period I don't recollect any negroes serving on the grand jury. I couldn't say whether they had or had not; I just don't know.

J. W. SIMMONS, sworn in support of the motion, testified:

I receive the petit jury boxes from the jury commissioners and keep them in my custody until such time as the court draws the petit jury; when the time arrives for the petit jury to be drawn, the judge drawing the jury sends for it by one of his officers. I am not present when the judge draws the petit jury. As to what judge drew the January panel of the petit jury this year, whichever judge is in charge of the first division of the criminal court [fol. 96] usually does it; whether he did it or not, I don't know. I reckon he did; we can get you the information in a minute; this jury was drawn by Judge Pomeroy on the 9th of December, drawn for Judge Thomas; here is a memorandum here that says so, Judge Thomas was in the first criminal division, but on account of absence he got Judge Pomeroy to draw it for him.

Recess here taken until 9 a. m. January 17, 1933.

[fol. 97] January 17, 1933, 9 A. M.

The following evidence was delivered before the jury:

F. B. Watson, sworn in behalf of the State, testified:

Direct examination:

I am a city policeman. I know Angelo Herndon. I first came in contact with him last July, at the post office in this city, when I arrested him; at the time I arrested him he was in the lobby of the post office, here in the city of Atlanta; we had orders to go to the post office and watch a box, No. 339, I believe, and to arrest the one that came there after the mail; we were there something like an hour, this negro boy, Angelo, came up. He came to this box, taken his mail out and we put him under arrest; at the time he unlocked his box and taken the mail out of the box, he had with him at the time a paste-board box containing books, papers and pamphlets. I would recognize that box if I saw it; this box and its contents is what we taken off of him. I recollect examining the box after the arrest. I identify that box and those pamphlets as the contents of the box at the time of the arrest of this defendant. I searched him at that time. I saw him open this mail box, he had a key to the mail box; this looks like the key that he had; this straight key that looks like a door key, he told us that belonged to his room. After he was arrested, we went to his home, at the place he said was his home; he first taken us over on Coleman Street and he didn't live there; so we asked him where his room was at after we left this Coleman Street address, I forget the number, and he taken us on Hubbard Street; we found his room there on Hubbard Street. I said something to him about where he lived before we started from the post office with him; we found out that he didn't live on Coleman Street, because we went there and took him with us. He went with us to [fol. 98] this address on Coleman Street; we went in the house and we asked a negro man did he know this boy; he said he knew him but he didn't live there; this boy was there; after that, we asked him what did he have to say to that, and he says he lived on Hubbard Street, and he taken us to his place where he lived on Hubbard Street. When we got to the place on Hubbard Street we went in and asked who lived there; a woman by the name of Carrie

Jackson lived there; she said he roomed there, and showed us his room, and we went to his room and searched it; when she said that was where he lived, Angelo was with us and I heard Carrie Jackson identify him, and he heard Carrie identify him as connected with that room; we then searched his room and all his papers and things that were in his room. That place at the post office and on Coleman Street and Hubbard Street is in Fulton County, Georgia. I recognize this box and suit case as the two pieces we got out of his room; these newspapers, books, periodicals and such, they came out of his room. We talked to him about where he got those things and how he came into possession of them; before we started our conversation with reference to the documents and things, we did not make any threats against him or offer him any reward or any inducements. He told us they were sent to him from headquarters of this Communist Party, in New York. He told us he was working for someone by the name of Spence, that lived on Peachtree Street, but he didn't know the number. He did not at first discuss the nature of his work, he did later on; as to the nature or purpose of his work, he said he was sent here by this Communist Party as an organizer for them, representing this Communist Party; I don't remember now how long he stated he had been here. He did not say what he had done as such organizer. We ta-ken him them and locked him up.

[fol. 99] Cross-examination:

I am a policeman. I arrested Angelo Herndon at the Post Office; at the time I arrested him he was taking mail out of a box; he got two or three letters out of the box; he didn't get anything else out of the box. I was not looking for Angelo Herndon before I went to the post office; we didn't know who we were going to catch at this box when we went there; we did not look for any one at all on Smith Street in connection with this particular case. When I got the alleged confession from Angelo Herndon, Mr. Chester was with me at that particular time. At that particular time we were at police station, in the detective department, on the second floor; we did not go up on the fourth floor; there is no fourth floor there. I did not know there was a big electric chair stationed there; I never have seen it. Mr. Chester and myself searched Angelo's house; we did not have a warrant to do so, we searched him without

a warrant; we got these papers and magazines and periodicals. I didn't read them, I don't know what they are; they are there, you can look at them and tell what they are; I can identify them just by looking at them. We searched Angelo's person; we did not have a warrant to do so. I did not see Angelo Herndon circulate this material. I have never been to a meeting and found Angelo there; I have never heard him make a speech. He said he is a member of some kind of organization—Mr. Chester heard him say that. I did not carry Angelo Herndon and have him sit down in a big electric chair at the police station; I didn't know there was one down there; we carried him to the detective department on the second floor; when we got there we talked to him, that's all. Angelo Herndon said this material was sent to him from New York. I don't know that they were sent from New York. He got some mail [fol. 100] from the post office; this was mailed in Atlanta—here's the mail we taken off of him, that he got out of the box. I did not see Angelo Herndon attempt any combined resistance to the State government or any of its officers; he was perfectly peaceful when I arrested him; he came to the post office box and was taking his mail out when I arrested him. This box that he had, we got that off his person at the time we went to the post office; he had that under his arm.

J. W. Clonts, sworn in behalf of the State, testified:

I am a United States post office clerk in the city of Atlanta, and have been connected with the United States post office about six and a half years. The renting of boxes to individuals at the post office is my job entirely. We have an application here showing James Dicks rented box No. 339, January 8, 1931, and held same until September 30, 1932. I am not acquainted with Angelo Herndon; I wouldn't know him if I was to see him. I recognize this document here with this number 1201 on it; it is our serial number, 1201, issued for this box, No. 339; has my initials here as taking in the $2.00 for three months. The document dated September 29, 1931, No. 1039, I recognized that, and it is for box 339. I collected the rent on the box. The document here, No. 1557, is our serial number, for box 339, that was

received by my superior officer, $2.00, and is for the same box, No. 339. Number 798, the 798 is our serial number for box 339, collected by myself, December 30, 1931. I see James Dick in the court room; he is sitting right there between the two gentlemen at the end of the table, the gentleman with the glasses, to the right, with the red striped tie on; that's the man I know as James Dick. I did not rent [fol. 101] the box myself, but I collected the rents three different times; that is the man that paid me the rent on that box at the post office.

Cross-examination:

I am employed at the United States post office as clerk. That fellow over there with glasses on is the man that represented himself as James Dick; he did not always wear glasses. I'll give you the exact dates, how long he has been renting box 339; it was around January 8, 1931. The last time a payment was made on that box was for the quarter beginning July 1, 1932; it was made probably made in August, 1931, I believe is the date; the date on this receipt will show, but, as I remember, that's the last time I saw James Dicks, when he paid this rent. I did not rent the box myself, but a colored man who represented himself as James Dicks always paid the rent, I don't know who rented it.

F. B. Watson, recalled in behalf of the State, testified:

This folder was in the possession of Angelo Herndon at the time of his arrest; these post office rent receipts were in that folder at that time.

Cross-examination:

As to whether at the police station, on the last floor, they have installed there a big electric chair, a coffin and a skeleton, I don't know what is up there; I don't know anything about that. I don't remember telling Angelo Herndon when I was carrying him to the station house that I had been to 860 Smith Street looking for him. When Angelo Herndon made the confession which I stated here, we were at the police station in the detective department, on the second floor. Mr. Chester was with me and heard it.

[fol. 102] Redirect examination:

The man right here with the red striped tie on is the one that gave me the name of Angelo Herndon at the time of his arrest, that is, the defendant in this case. We were in Fulton county, Georgia, when that occurred. He did not wear glasses at that time.

E. A. Stephen, sworn in behalf of the State, testified:

I am connected with the courts of Fulton county; I am one of the assistants in the solicitor general's office. I know a man who gave the name of Angelo Herndon to me; I talked with him after his arrest, in the grand jury room of this court house; my understanding was that he had just been arrested and brought in the court house and I questioned him in the grand jury room, one of the officers of the police department was with him at the time, but I don't recollect who it was; it was a police officer, or officers, brought him there, and one was in the room while I questioned him, I tried to refresh my memory and find who it was, but I don't recollect. It would be a hard thing to remember at this time what I said to him. I can give you the substance of the things; I did not make any promises to him or offer him any inducements to talk to me, and made no threats at all against him. As to what I talked about, if I may I will start at the beginning of my knowledge of this affair, and I state that on complaint from one of the county commissioners that he had received a certain scurrilous letter through the mail, which bore post office box No. 339, I called on the chief of police to have that box watched and the man who got the mail out of there taken in charge and questioned; the same day, Officer Watson, or Mr. W. B. Martin, I don't recollect which, brought this darkey, Angelo Herndon, to [fol. 103] the solicitor's office and I talked to him in the grand jury room.

Attorney Davis: Mr. Stephens refers to the defendant as "darkey". Your Honor, we wish to remind the prosecution if they insist on using such opprobrious terms to the defendant, we will have to ask for a mistrial, because it is prejudicial to our case.

The Court: I don't know whether it is or not; but suppose you refer to him as the defendant.

Your Honor, I wish to state that "negro" is the name this man referred to his race *by* in his conversation with me—these are captious objections.

Attorney Davis: But he says "darkey".

The Court: Well, refer to him as the defendant then.

I will refer to him as "negro" which is better; he gave the name of Alonzo Herndon—Angelo Herndon; he is the darkey with the glasses on, in the middle, the second one with the glasses on—he didn't have them on at that time; he stated that he came here from Lexington, Kentucky, where he was an employee of some coal mine company; he stated that a man by the name of E. Doran came there and got him interested in the Communist Party, and that he joined the National Communist Party at Lexington, Ky.; he stated that this coal mine association or organization that he belonged to was not communistic, but that he joined the National, the Communist Party at Lexington, Kentucky, at the instance of E. Doren—D-O-R-E-N, as he spelled it; he stated that he was sent to Atlanta to take the position of organizer for the Communist Party; now, when he was questioned by me as to what his compensation or interest was, he stated he was paid $10.00 a week, sometimes in cash [fol. 104] and sometimes in money orders. At that time he stated to me that his duties were, as organizer for the Communist Party, to call meetings, educate or disseminate information regarding the party at these meetings, to distribute literature, to secure members for the organization and generally to work up an organization of the Communist Party in Atlanta. I don't recollect whether I asked him the question how long he had been here in Atlanta. He said he had held or attended two meetings, and then later when questioned about where they were held he designated the meeting places of three meetings that he had called and had been held, one of them on Auburn Avenue, I believe, one in the neighborhood of Tiger Flowers' home as he expressed it, and one on East Cain Street, I think it was. I made memoranda at that time of the things he said to me; I made my memoranda so that wouldn't mean much to anybody else, because they were all private and made in as few words as possible. He did not state at whose homes these meetings were held; he stated the first meeting was held on Auburn Avenue in a vacant lot, the second was

held on the west side near Tiger Flowers' house, that is as definite as he put it; the third in a vacant house on Ellis Street, was his statement to me about the meeting; he did give me the names of persons that he said were members of the organization; said he only have five or six actual members at that time—actual members, as he put it; said the meetings were sometimes in vacant houses and sometimes in private houses; he gave the name of James Brown, of South Atlanta, along about Clark University, on the street turning off to the left, as one of his actual members that he designated, Willie Hendrick, in Decatur, on Atlanta Avenue, was one; Henry Brown, at the same address as James Brown; James Eberhardt, 860 Smith Street, as another, and there is one or two more that he said he [fol. 105] couldn't recollect the names of. At the time the officer brought him there he brought that large paste-board carton down there filled with quite a quantity of literature; I have examined this one here and it appears to have the same periodicals and other things in it, and he brought a suitcase, which is the one there before you and appears to contain the same things that were there when I questioned him. I recollect quite well seeing this document at that time; I had a conversation with the defendant with reference to the authorship of that document; we had quite a little controversy about his statement that he wrote it. I told him I didn't believe that he did, and I thought somebody else wrote that; I didn't think he was capable of composing it; he insisted that he was the author of it himself, and two other documents, of which there are quite a number in the suitcase, or were at that time; I think those writings or those documents are here in that suitcase; there are two that he claimed he wrote himself, they don't seem to be in here; there were two different circulars, quite a quantity of each one of them; they are not here; they were in this case when I got it out Sunday afternoon; it was a pile somewhere around a couple of inches thick, when I got these out Sunday—here they are, they don't seem to be all here; now, here is what I referred to, there are two different circulars here, I mean the composition of each is different from the other; we discussed the authorship of these and of these and of these two; he stated that he composed one or wrote one and sent his manuscript to Division Headquarters at Chattanooga and had it multigraphed and returned

to him, and I made a memorandum of the number that he said was returned to him for distribution; he stated that the first was drafted by himself and sent to Chattanooga to [fol. 106] have multigraphed and they returned ten thousand of them and he had them distributed; he stated that the other of the two circulars was composed in Chattanooga, multigraphed there and seventy-five hundred, I believe it was—I have it here seven hundred and fifty, but I think he stated seventy-five hundred—were returned to him for distribution, and that he had the bulk of those distributed here in Atlanta. I couldn't tell you which one of these he said he wrote; he said the first one, and indicated at that time, but I didn't do anything to identify them. I don't see any date on either one of them so as to identify them as to any particular time and the contents of the thing, though, rather indicates to me that this one I hold in my hand, headed "Workers in Atlanta, Employed and Unemployed Negroes, Attention," was the second, because it refers to something that was done at the demand of him and his friends; and the first one, the one with the pictures on it, I think is the one he claims he wrote; I wouldn't be positive, one or the other he stated he composed, and that the other was written in Chattanooga and sent here to him—a manuscript of several pages, which he stated he wrote with his hand. This document here is the one I stated I had a controversy with him as to his writing; that is the one I said he insisted that he composed. He made these statements to me freely and voluntary; I want to state, further, among the other things he said in talking to me about this quantity of literature here in the suitcase and in the grip, a part of which you will notice has never been taken out of the wrapper—there are several packages like this—in questioning him what this was sent to him for; he stated for distribution at his meetings; the same with reference to many of the books that he had in these two receptacles there. He stated that he had called three meetings and undertook to tell we where he held them. I don't [fol. 107] recollect seeing this document here of July 10, but I will state that he stated to me that his organization of communist, at that time had only five or six active workers, I see that is the same information. I can't say that I definitely call at that time seeing this document entitled "Minutes of the Foster and Ford Club, July 8, 1932, Club

3," and the meeting started at 8:30, I know, though, that the box and the suitcase were taken charge of by me and put under lock and key, and so far as I know they were never taken out until I got them out to use Sunday afternoon. He said that he called the meetings and held them and conducted the meetings; as to whether he said he made any speeches at any of those meetings, I don't know that the word "speech" was used.

Cross-examination:

I am Assistant Solicitor General, as I stated a few minutes ago; I am not interested in this particular case any more than I am in all cases which are indicted by the Fulton County Grand Jury. When Angelo Herndon made his confession, as I stated before, I don't recollect what officer it was who was present besides myself, but some member of the Atlanta police force. When Angelo Herndon undertook to tell me about the meetings, I don't know whether he ever finished or not. I don't know of my own knowledge any meetings with speeches, I didn't attend, if I had I would have had him arrested then; I am not particularly prejudiced to him according to my last statement, but if a man has violated the law, as an official of this State, I would have him arrested for doing it; he violated the law stated by Mr. Hudson in your presence in outlining this case, you know what it was, you heard it. It is not true that I had Angelo Herndon in the grand jury room attempting to get some information that I might indict him, I was undertaking to find out about his activities here. I was able to find out a good deal, by questioning him. As [fol. 108] far as my personal knowledge is concerned, I would not state this confession was all the evidence we have against him; I know nothing personally. I know Angelo Herndon said he was the author of some of the leaflets. I have no personal knowledge of any of the acts that have been alleged to be committed in the indictment by the defendant.

* * * * * * *

[fol. 109] F. B. Watson, recalled in behalf of the State, testified:

I am familiar with the location of Auburn Avenue, with reference to the limits of Fulton County; the entire street of Auburn Avenue is within Fulton County. I am familiar with the location of the house or residence in Atlanta that is known as the Tiger Flowers' residence, which is on Simpson Street, which is on the west side of the city of Atlanta, in the city of Atlanta, Fulton county. The whole west side of Atlanta is in Fulton county. I am familiar with Ellis Street, the entire street is in Fulton county. With reference to the city of Atlanta as a whole, all of Atlanta is in Fulton county, just a small area on the east side is in DeKalb county, all of the business section of Atlanta is in Fulton county, only this small area on the east side, a residence section, is in another county—the suburbs.

Cross-examination:

Every bit of material that was in the box I found on Angelo Herndon at the time I arrested him, I identify as the stuff in the box, every thing, even down to these little pencil stubs, I recollect these, every one, I did not write down the colors of the pencil, there was five or six pieces of pencils in the box, every little piece of booklet and leaflet, I identify it, I got the mental picture of it in my mind, so that I can identify everything there. I have never seen Herndon distribute any of the material I identify in the box, and have never been to a meeting where I ever heard Herndon speak. I have never seen him a single time resist an arrest; I have never seen him combine with any others, whether white or black, in resistance of the State government.

Redirect examination:

I have examined the contents of this suitcase, and these boxes. I identify this bundle of what appears to be news-[fol. 110] papers entitled "The Southern Worker," as having been found in the home or place where Herndon was living. I identify this batch of "Daily Workers," which you exhibit to me, as having been part of the documents found in his home at that time. I identify this package with this address, Mrs. Lula B. Jackson, 908 —— Avenue, Atlanta, Georgia, and this title "Southern Workers"; this batch of newspapers entitled "Daily Worker," is some of

the things I found there at the defendant's residence; this additional batch of papers entitled "Daily Worker," "Central Organ Communist Party, U. S. A." and this batch of papers entitled "Daily Worker," and this batch entitled "Daily Worker"; I recognize this periodical, entitled "The Liberator" with the entry thereon, as one of the periodicals discovered at the defendant's home; this is another batch of newspapers entitled "Daily Worker, Central Organ of the Communist Party, U. S. A." found at the same time and place. I recollect seeing this document "Tornado Toll, 65 negroes, Atlanta World." What you now exhibit to me, which appears to be three or four copies of a paper entitled "Daily Worker" is one of the batches of papers I found at the same time and place; I recognize the "Recreator," as one of the articles found in the suitcase. I recognize this, entitled "American Press," as one of the periodicals that came out of the same place; this batch of books here, which seems to be in a serial order, the first Christian Supernaturalism, Volume 1, I recognize that, that was in the suitcase in his room; second Christian Supernaturalism, I recognize that; third, Christian Supernaturalism, Volume 3, I recognize that, that was in his room; fourth Christian Supernaturalism, I recognize that and Volume 5, that whole batch was in his suitcase, and this volume, the Bible, and this book of Christian Supernaturalism, Volume 6, Sociology, I recognize all of those; this pamphlet with the red leaflet entitled "War Preparations against the Soviet Union," is one of the periodicals found there. I [fol. 111] recognize these papers, periodicals and documents as part of the literature I found at the same time and place. About this package with the address torn off, which appears to be a group of about three or four papers, called "The Young Worker," that was in his room with all the rest of these; this batch of papers addressed to Alonzo Eberhardt, 774-B Hubbard Street, Atlanta, Georgia, which appears to be a batch of newspapers entitled "The Daily Worker," I got those at the same time and place; I recognize the batch of papers entitled "Daily Worker," as part of the papers I found in the same place at the same time; this additional batch of the same papers "The Daily Worker," I recognize that as having been found at the same time and place; this batch was there at the same time and place. These papers that appear to be

local papers, Georgian, Constitution and "Daily Worker," all of these local papers was together; I recognize this batch of papers called "Liberator," as part of the papers discovered there at the same time, and this batch of "Liberator"; this batch of Daily Worker and another batch of "Liberator," they were there at the same time and place; I recognize this other batch of papers entitled "Daily Worker," as found at the same time and place, and this "Liberator" also found at the same time and place, and this other batch of "Daily Workers," they were at his address, the same place; a copy of the Constitution for July 8th, and there was a batch of local papers in his room, that was one of the local papers that was in there, the Georgian, and this one, the Constitution, also this batch of Daily Workers, Young Workers and Daily Workers, they were in his room; another batch addressed to Alonzo Eberhardt, 774-B Hubbard Street, dated 10/3/29, Daily Workers, they were there at the same time and place; this wearing apparel, shirt, undershirt, socks, slip, book, toilet articles, those were in the suitcase at the time we searched his room. I don't know how many issues of these various newspapers that are in this batch in this box and suitcase, I didn't [fol. 112] count them, but there was a batch of them that was all rolled up and wrapped up, some of them, and some of them was loose; I recognize these books here with white covers on them and this picture of William Montgomery Brown on the front, and two angels on the back, entitled "Heresy" they came from there, and this one; and this one; I looked at this batch of stuff here, this envelope, that was there at the same time and place I found these, the envelope with this address on it; this little card here entitled "Abolition" that was in his room; invoice of S. P. Richards Paper Company and I noticed this Red Bird tablet among the effects I found there at that time, all of that stuff was tied together with this batch of books, it has got some of the string on the books.

Cross-examination:

I'll just glance at the headline of the material I found there, I didn't read any of them, in the body of them. Some of the material in there is either radical or communistic in nature, I might have read a little of it. I remember Mr. Hudson calling to my mind a certain publication called

"The Recreator," I found that in his room; I don't know whether that is of a radical nature, too, I didn't read it. I identified the keys that were taken off of Angelo's person at the time I arrested him, those were the keys to the post office box, one of them was; I don't know whether there was any other keys to that post office box, I taken that one out of his hand, and I don't know whether there was any duplicate keys held by any other person, I don't know whether Angelo Herndon was the only person that used that box, if there were any other persons that did use that box, I don't know whether they were black or white.

The State here rested.

[fol. 113] Prof. Mercer G. Evans, sworn in behalf of the defendant, testified:

I am a teacher at Emory University, in the department known as Economics. As to the degrees I hold, I have Batchelor of Science degree, Emory University, Master of Arts, and Doctor of Laws, Chicago University, I rank as Professor of Economics, just one of the Professors of the Economics Department, there are two Professors and two assistants. I was born at Gulfport, Mississippi; except for residences in colleges, I was there about twenty-three or twenty-four years. My undergraduate work was done at Emory University, my graduate work was done at Chicago. I have examined the books cited in the indictment against Angelo Herndon, all the way through.

[fol. 114] As to whether I know the difference between revolutionary material and literature which isn't revolutionary, I have read rather widely, I suspect, in the field of economics, the theoretical economics, including a good deal of Anarchistic and Sociological or Communistic literature, which is, of course, on an economic nature. I have not published any books of any sort dealing with economic subjects, but I have articles; some of the magazines that have carried my articles are Annals of the American Academy of Social and Political Science, and the publication of the American Federation of Labor; the Annals of the American Academy is an economic publication of, I think rather high-standing among the Professors of the Social Sciences, while the publication of the American Federation

of Labor is a publication in the field of Psychology and social service, which is rather widely taken by Professors of Sociology, and Social Service Welfare and the American Federationist, the official monthly publication of the American Federation of Labor has frequent contributions in it of Professors of Sociology. I have read the books stated in the indictment.

[fol. 115] I have some books in my possession here that are taken from Emory University Library, here are three books that come from Emory University Library, one from Carnegie Library, this first one is my Nicolai Lenin, entitled "Imperialism, State and Revolutionary," the second one is by Carl Marx entitled Christ, a prophet, addressed to working men, the third one is by Carl Marx and Frederick Ingalls, entitled "Communist Manifesto," Nicolai Lenin was a Bolshevik leader in Russia; that book came from Emory University Library; in other words that book is there in the library for the students use in Emory University. The students are at liberty to get these books and read what they wish.

Q. And it isn't the rules of Emory University that they should think what they wish?

Solicitor Hudson: That is irrelevant and immaterial, Your Honor.

The Court: I rule that out. If Emory University is [fol. 116] guilty of anything, we will try them, I think even if Emory University had actually attempted to incite riot, it wouldn't be material in this case, it is a question of what this defendant has done.

I don't believe I have any other books from Emory University Library, I have one from the Carnegie and a few from my own.

I have no other books from the Carnegie Library, that's all.

[fol. 117] Cross-examination:

I have been a member of the faculty of Emory University; this is my ninth year. I don't have this pamphlet "The Communist Position and the Negro Question." I don't have this document here, "receipt book." Emory University is a denominational school; I do not belong to the denomination that founded that school, but to another one,

Congregationalist, in other words, I am not a Methodist, and am not an Episcopalian, I am not a Communist, and I am not a revolutionalist; I am acquainted with what is known as the Communist of Soviet Russia, or the Soviet Union, of the present form of governments in the nation of Russia, that is a government which succeeded the Kerensky government, which succeeded the former Czarish government; that was brought about by a revolution, putting out the Czar and the assassination of the Czar and his family came later, not necessarily as the result of a revolution. [fol. 118] As to the Russian Revolution, history so regards it, that there was a revolution, the Czarish government overthrown, the Kerensky government took charge and after about six months another revolution of bloodless character in which the present regime succeeded the Kerensky government. I wouldn't attempt to dispute that, as an historical fact, what I have just said; I stated that as being an historical fact. I think I read that little paragraph in this fine print at the bottom of the page, page 6 of this document here. I stated that I hadn't seen this, this pamphlet "The Communist Position on the Negro Question," I haven't read the book. I don't think I read that in the platform of the Communist Party on which Ford and Foster ran this year in the United States for election for President and Vice-President; I think I read the Communist platform, I am not sure; yes, I read the Communist platform in the summer that was put out by the National Magazine. I have not read this little pamphlet here "An Appeal to Southern Young Workers," and especially the back part of it here beginning with No. 7 on down. I have been to Russia, I was over there this summer, I spent in Russia about two weeks, I think.

Angelo Herndon, defendant, made his statement as follows: Gentlemen of the Jury: I would like to explain in detail the nature of my case and the reason why that I was [fol. 119] locked up. I recall back about the middle part of June in 1932, we remember that the Relief Agency of the City of Atlanta, and also the County Commission and the City Government as a whole, they were cutting off relief of unemployed workers, both white and colored, in the city of Atlanta, and we know there were citizens that suffered unemployment, hundreds and thousands of negroes and whites each day looking for work and there was no work

to be found during those days. Well, the Unemployed Council of Atlanta which has connection with the Unemployed Committees of the United States, through the organization of the Unemployed Committees—the committee after this relief had been cut off and after over 23,000 people right in Fulton County and Atlanta, Georgia, the Unemployed Committee—which is the policy of the Unemployed Committee not only in Atlanta but throughout the whole United States, started to organize the negro workers and organize the white workers together on the same basis, because of the fact that their interest are the same, because the white workers were starving and because of the fact that the negro workers was starving, and the unemployed committee realized this, in order for the white workers to get relief, and in order for the negro workers to get relief, they both will have to get together and forget about the question of racial discrimination, forget about this question of the white skin and the black skin, because both are starving and the capitalistic class will continue to prey on this tune of racial discrimination, that the negro skin is black and yours white, and therefore, the negro is no good, and therefore they were bound to prey on this tune in order to keep the negro and white divided. So the policy of the Unemployed Committee was to organize negroes and whites together on the basis of fighting for an unemployment relief and unemployment insurance at the expense of the State. The Unemployment Committee had issued those leaflets after this relief had been cut off, which meant starvation on [fol. 120] the part of thousands here in Atlanta; the Unemployment Committee issued those leaflets calling upon negro and white workers to attend a meeting down at the courthouse building on a Thursday morning, I forget the exact date. This was as the result of statements handed out in the local press by County Commissioners that there was nobody in the City of Atlanta starving, and that if there was, to bring them to their office and they would be willing to look into the matter. This was a statement mainly by Commissioner Hendrix. Well, the Unemployed Committee of Atlanta pointed out in this circular that there was unemployed negroes in the city of Atlanta and there was actual starvation on the part of these workers, so the Unemployed Committee called for a demonstration in this courthouse building, about the middle part of June, and when this

committee came down to the courthouse, Commissioner Hendrix, it happened so he wasn't present that morning, and there was unemployed white women with their babies almost naked and without any shoes to go upon their feet, and there was negro women with their little babies actually *actually* starving for the need of proper nourishment and all that, which had been denied them by the county of Fulton and State of Georgia and city of Atlanta as a whole. Well, these particular negro workers, and the white workers, they came down to the commissioners' office to show that there was starvation in the city of Atlanta and that they were in actual need for food and proper nourishment for their kids, which they didn't receive. Well, these workers went up to the County Commissioners to show them these particular facts, and I think Commissioner Stewart was in at that time, and so that to divide the negro and white workers, they taken the white workers on the inside of the room and left he negro workers on the outside, this in order to continually play on the tune of racial discrimination, in order that they would be able to block the fight that the negro and the white workers were carrying [fol. 121] on—a determined fight to get relief. So they were successful in getting the white workers inside of the commissioner's room and closing the door in the face of the negro workers and pointing out to the white workers "Well, the county hasn't any money, and of course, you realize the depression and all that but we haven't got the money." We know this, after the white workers cut out their discussion, they knew the county did have money, but they were using it for their own interest, and not for the interest of the negro workers or the white workers, either way; and they talked to the white workers some considerable time, the white workers came out, they had just about as much results as the negroes did—only a lot of hot air blowed over them by the commissioners, which didn't put any shoes on their little babies' feet and no milk in their stomach to give their babies proper nourishment. Well, these men, the white workers were in the same condition that their negro brothers on the outside were in—no one disputed the fact they did keep the negro workers on the outside. Well, as the result of this, in spite of the fact that they had come out in published statements that there

was no money in the county treasury to provide unemployment relief for the negro and white workers, still the next day after the demonstration the county commissioners voted $6,000.00 for unemployment relief, mainly because of the fact it was shown in this demonstration that for once in the history of Atlanta and the State of Georgia, negro and white did join together and did go to the commissioners and demand an unemployment insurance because of the fact that they had worked in the city of Atlanta, have worked in different industries, different shops and different other industrial concerns located in Atlanta for their whole life, doing this work, building up the city where it is at the present time. Now, because that time, when they were in actual need of this money to hold their bodies together, and [fol. 122] when they came before the State and county officials to demand something to hold their bodies together, they were denied it, so the policy of the Unemployed Council is to organize these workers and demand these things. They have worked as slaves, and they are entitled to those things, whether they get them or not. Of course, the workers will get them if you ever organize for them. And as the result of this demonstration after those circulars had been distributed through the City of Atlanta, from the solicitor's office he had two detectives stationed at the post office to get any one who came to get mail out of this box 339. Well, on Monday, July 11, 1932, I went up there to get mail from this box, because of the fact I was a member of the Unemployed Committee and also an organizer for the Unemployed Committee. I went up there to get mail, and these two detectives, Mr. Watson and Mr. Chester, was stationed at the instructions of the Solicitor General, to lock up whoever came up there, because of the fact they had organized unemployed workers, negroes and whites, of Atlanta, and forced the county commissioners to kick in $6,000.00 for unemployment relief. So, for this I was locked up and carried to the station house and held eleven days without even any kind of charges booked against me at the station house. The charge was "suspicion." Of course, they knew what the charges were going to be, but still in order to hold me in jail—give me the dirtiest kind of treatment that you can describe and all sort of inhuman treatment, they held me there eleven days without even any

charge whatsoever until my attorney filed a writ of habeas corpus demanding that they place charges against me or turn me loose. This was about the 22nd of July, I still hadn't been indicted; there had been three sessions of the grand jury meetings, and my case had been before them each time, and the grand jury still hadn't indicted me, because of the fact they just wanted to hold me in jail [fol. 123] for some time simply for organizing the white and negro worker, demanding food to keep their bodies together. Upon this basis they held me in jail all that time. So at this habeas corpus hearing, the judge ordered if I wasn't indicted the next day by 2:30 to turn me loose. Of course, the solicitor assurred the judge there would be an indictment by next day, which, of course, there was, and ever since then I was transferred to Fulton county tower, where I remained there close to six months—I think the exact time was five months and three weeks. But I want to describe some of the horrible conditions I was forced to go up under in the Fulton county tower there. I was placed in a little cell there with a dead body and forced to live in there with this dead body because I couldn't get out of the place—couldn't even walk around, stayed locked up all the time. This particular fellow, his name was William Wilson, who also fought in the Spanish American war for the American principles, as we usually call them and they had him there on a charge of alimony, so he died in there as the result of the rotten food given to all prisoners in there, and for the want of medical attention. Well, the county physician just had refused to give this particular prisoner any kind of attention whatsoever, so after three days sickness, as the result of this, this prisoner died and I was forced to live in there with this dead man until the undertaker came and got him out. These are just some of the things that I had to go through in jail; after that I was sick myself, because of the fact that the food they gave me in there, I couldn't agree with it, and not only me but hundreds of other prisoners who can't eat the food. For instance, you have peas and beans for one dinner, and probably you have it three times in the week, and at times you probably find rocks in there and you crack down on them with your teeth, you don't know what it is, and you spit them out and there it is. They have turnip greens,

and just as they are pulled up out of the ground and put [fol. 124] in the pot, that's what you have to eat, otherwise you don't live. Next morning they have some grits—look like they were baked instead of boiled, a little streak of grease running through them, and about a couple — of this fat back, that's what you have to live on; and as the result of this particular fight, I was forced to live in jail five months without trial. My lawyer put in demand, demanding trial, and every time the State would postpone the case, because of the fact that they knew those workers in the city of Atlanta were starving and when they come and arrest Angelo Herndon and put a charge of attempting to incite insurrection—which carries the death penalty—because of the fact that he did organize negroes and white workers into a demonstration which forced the County Commissioners to kick in with $6,000.00, they locked up Angelo Herndon on such charges; but I can say this quite clearly, if the State of Georgia and city of Atlanta think by locking up Angelo Herndon, of course, there will be more Angelo Herndons to come in the future, because of the fact there are thousand of negro workers starving and thousand of white workers starving and if they want to break up this organization they can go and lock up everybody in the organization and place an insurrection charge against them, then they will be able to prosecute them, because these are the basic reasons the State of Georgia had me locked up, because of the fact they knew the workers were starving and they knew the workers needed relief, and they know now the workers are going to organize and get relief. Of course, we know it will take fights and all that to develop these particular suggestions on the part of the negro and white workers. So, after being in jail all of this long time—there was continual efforts by the defense attorneys in my case to get a trial, the case was set for trial several different times and each time the State wasn't ready for trial, for no reason still, they put it off; and after staying in there so long, I was sick in there several weeks, [fol. 125] which, of course, I asked for aid from the county physician and was refused that; the county physician came and looked through the doors and says "What's the matter with you?" I says "I'm sick, can't swallow water, my chest up here is tight and my stomach absolutely out of order,

seems I am suffering with ulcers or something," the county physician says "Oh, there's nothing the matter with you, you're all right;" I says, "I know my condition, I know how I am feeling;" he says "You'll be all right." So, through friends, I was able to get some medicine in there which did do me good, because after eating all that rotten fare and stuff in there they give you I had indigestion in there, and couldn't drink even a drink of water, so after I taken that medicine I began feeling better, and I got out on Christmas Eve day on bond, my bond once was $3,000.00, and they raised it from that to $5,000.00, and from that up to $25,000.00, just in order to hold Angelo Herndon in jail all the time, and by holding Angelo Herndon in jail all the time will stop these demonstrations, which made the County Commissioners kick in $6,000.00 for the unemployed. Well, they can hold this Angelo Herndon and hundreds of others, but it will never stop these demonstrations on the part of negro and white workers who demand a decent place to live in and proper food for their kids to eat; but I want to say also, that the policy of the Unemployed Committees is to carry on a constant fight for the rights of the negro workers, because of the fact that the Unemployed Committees realize that unless negro and white workers are united together, they can't be able to get this relief, because it is to the interest of the capitalistic class to stir up all of this race hatred between negro and white workers and keep it going all the time, tit for tat, and the negro running after the white workers, and the white workers after the negro workers, and at the same time they are able to keep their eyes on the negro workers' conditions and the white workers' condition. The policy of the Unemployed Committees is to expose these things. Though there was no [fol. 126] negroes in the United States, there would still be a racial question, probably it would be the Jews, or the Greeks, or something like that, because it is their interest to bring up all of these things, so that they can get a good profit out of the working people. But it happened that the negroes skin is black, and the white workers' skin is white, and they attempt to use this so that they can oppress fifteen million people—"Well, it is a great amount of profit that we can get from the ranks of the working class, and at the same time have in mind that the white workers are

going to run the negroes, therefore, we may continue to keep our system," or of probably robbing the working classes of what they could produce. I don't have to go so far into my case, no doubt some of your jurymen sitting over there in that box right now are unemployed and realize the situation of unemployment, and you tramp the streets day in and day out looking for work and can't find work—well, you know it is a very serious problem and the future looks so dim until you don't know what to do, and at times you go nuts and want to commit suicide or something, but the Unemployed Committee points out to the negro workers and the white workers that the solution is not in committing suicide, that the only solution is not in continuing to fight, the negro workers fighting the white workers, and the white workers fighting the negro workers, but in organization, and we will be able to get better conditions, because it is then left up to the negro workers and to the white workers to get these better conditions. Now, why do I say that? I say it because of the fact that the capitalistic class, it is to their interest to keep the ranks of the poor working class down all of the time and get as much profit from them as they possibly can. So, on the other hand, it is to the interest of the negro and white workers to get as much for their work as they can—that is, if they happen to have any work; unfortunately, at the present time there are millions and millions of workers in the United States without any work, and the capitalistic class of the State govern-
[fol. 127] ment, city government and all other governments, they have taken no steps to provide relief for those unemployed, and this question is left to the white workers and the negro workers, they will be able to organize and demand the right to live, which they are entitled to, because they have built the country up to where it is at the present time, and therefore, they are entitled to these particular things. Not only are they entitled to them, but it is their right to demand these things; so, when the State of Georgia and the city of Atlanta raised a question of inciting and attempting to incite insurrection, or attempting to overthrow the government and all of that, well, I can say, no matter what they do with Angelo Herndon, no matter what they do with the Angelo Herndon in the future, this question of unemployment, the question of unity between negro and white

races, isn't a question that happens to fall out of the sky, but it has intimately affected us and we can't deny them. We know the system we are living under is on the verge of collapse; no matter what system we are living under, it has developed to its highest point and comes back—for instance, you can take a balloon and get so much air in it, and when you get too much it bursts; so with the system we are living under—of course, I don't know whether that is insurrection or not, but the question, it has developed to its highest point and it is back, and therefore, it is our duty and our rights to organize ourselves and demand these things, otherwise, we will continue to be starved, continue to be thrown out of our houses because of the fact we are not able to pay rent, and because of the fact that they have no jobs to give us and we are willing to work if they give us jobs, so why not give us unemployment insurance at the expense of the State and the employers, not at the expense of the humanitarians, the few who are still employed, but from the right class of people who has robbed and taken everything from the ranks of the negro and white workers, [fol. 128] it is their duty to contribute insurance by special taxation from the Federal Government and also by the State government, that these funds are to be used for the relief of the negro and white workers.

T. J. Corley, sworn in behalf of the defendant, testified:

I live at 1600 Emory Road, Northeast. I am an assistant professor of economics at Emory University; my home is in Comanchee, Texas, I was born in Texas. I have been teaching at Emory, this is my second year, I have never been in Russia. I am not a communist, and am not sympathetic with communism in its entirety. I find elements within communism with which I agree, but before I could answer that question, as to whether I am sympathetic with communism, I should have to ask you to define communism. I am acquainted in some detail with the platform of the communist party in the last November election; I remember off-handedly some of the planks in the platform.

Q. Will you name one or two of them?

As I recollect, self-determination in the black belt was not one of the planks in the communist platform in No-

vember. Unemployment insurance at the expense of the State and the capitalistics was in the platform; I am sym- [fol. 129] pathetic with that plank, I approve of that part of the communistic doctrine.

I am familiar with the platform as a whole, I would recognize it if I saw it, with some changes. I don't have the platform memorized, I couldn't repeat it item for item, I am familiar with all of the principles contained in it. The first plank is unemployment and social insurance at the expense of the State and employers; second, against Hoover's wage cutting policy; third, emergency relief for the poor farmers without restrictions by the government and banks, exemption of poor farmers from taxes and from forced collections of rents or debts; fourth, equal rights for the negroes and self-determination for the black belt; fifth, against capitalistic power, against all form of political oppression of the rights of workers: sixth, against imperialism, etc. I am in sympathy with part of those. The communist party was on the ballot in November, some of the States, I believe, excluded it, a considerable number of States had it on their ballots, the communist party was on the ballots in this State. I did not vote the communist ticket.

Q. However, if you had wanted to express your approval in the ballots, by use of the ballot, of the Ford and Foster candidates, you would have placed your name on the communist ticket, wouldn't you? A. I don't believe I understood the question, will you repeat it?

[fol. 130] Cross-examination:

I said this was my second year with Emory. There is no little communist party over there at the University that I know of. I was not in the delegation of Emory professors which came to the solicitor's office after Angelo was indicted, I have never been to the solicitor's office. I have seen this little pamphlet here entitled "The Party Organizer," I haven't gone through the thing in detail, I have just seen it, I know some of the things inside of it. I was born in Comanchee County, Texas. I belong to the Christian Church, as it is sometimes called, the Carmelite Church. I stated that I was acquainted with the Communist platform.

Q. And this was read off to you: "Equal rights for the negroes; self-determination in the black belt;" you are able to tell us what that means, aren't you, Doctor? A. No sir.

[fol. 131] I did not testify that I understand the planks in the communist platform, I said I was familiar with the party platform. As to whether I will now swear that I understand it, the question which you raise, I should say, is a question of opinion and not of fact, there are some questions which are capable of an answer in fact, others are questions of opinion, I could give you my opinion of what it means. As to whether it takes an opinion to tell the court and jury the ordinary Decatur Street meaning of self-determination," I think it is a matter of opinion, there are several techniques by which self-determination might be expressed, for instance, there might be a plebiscite vote, or there might be an election for representatives to a body—there are a number of ways in which self-determination would assert itself, and I think it is a matter of opinion. I have not read this little pamphlet entitled "The Communist Position on the Negro Question." I would be glad to give the court and jury my understanding of the expression "Equal Rights for Negroes," the meaning of the phrase, as I see it, it is this: These rights are equal rights, are equal rights under the law.

Q. You understand that to mean the right of a colored boy to marry your daughter, if you have one?

Attorney Davis: We object to that question on the ground that it is irrelevant and immaterial and calls for a conclusion of the witness.

[fol. 132] The Court: He has him on cross-examination and that's a part of the language in the platform.

Attorney Davis: There is nothing whatever in the platform about intermarriage.

The Court: The same quotation he is reading there is in the platform, as I understand.

Attorney Davis: You overrule my objection, Your Honor?

The Court: I overrule the objection; go ahead.

A negro doesn't happen to have the right to marry my daughter, under the laws of this State. I don't know how many States there are in the Union where they do have that right.

Q. Did you know there are twenty States in the United States where the two races can intermarry or mix? A. No, I didn't know that, I knew there was a number, I didn't know how many.

Attorney Davis: I don't see what that has to do with this particular case, Your Honor, we object to it as irrelevant and immaterial.

The Court: He has the witness on cross-examination, and he has testified that he knows what that phrase means, and he has a right to determine how much he knows about it, on cross-examination—it isn't his witness.

That expression, "Equal Rights to Negroes," does not mean full political, social and racial equality. I have not read this little pamphlet here, "An Appeal to the Southern Young Workers," I have not seen or studied this little pamphlet here. I did not know that one of the demands of the communist party for the colored man is the confiscation of the lands, taking away from the white people who own the land, their lands and houses. I did not know that another one of the demands in the South was the right to establish an independent nation in what is known as the Black Belt, or the Southern and Southwestern portion of the United States, including the right to secede [fol. 133] from the United States Government; I did not know that was a part of the communist platform last year, 1932.

Q. Did you know that was stated in the speech made in May, I believe, this year, by C. A. Hathaway, nominating James W. Ford, of Alabama as a vice-presidential candidate to run with William Z. Foster of New York, for president; did you know that? A. That it was in his speech?

Q. Yes? A. No, I didn't know that, I don't know that I have seen his speech.

Attorney Davis: Your Honor, in this particular case, the witness testified he was qualified, and knew something about the platform, but Mr. Hudson is continually asking about questions that are not in the platform, he is continually asking him about questions that he didn't testify that he knew anything about; and we ask that those questions be ruled out and stricken from the record.

The Court: Well, he has him on cross-examination, and he has asked if he knew these things were said by the candidate of the communist party—an advocate of the party—he has him on cross-examination and I think he has a right to do that. I overrule the objection.

(The defendant here rested.)

W. T. TURNER, sworn in behalf of the State, testified:

I am engineer and steward at the jail; I have charge of the preparation of the food for the prisoners at the jail; my duties are to see that they are properly fed, about the maintenance of the building in the way of repairs and everything, in other words, the jail is the place for the sheriff's prisoners, he is the custodian of the prisoners, and I look after the cleaning and care and the upkeep of the building. I will say no rotten food is given the prisoners, we buy the best beans that can be bought, baby lima beans, [fol. 134] white beans and California black eyed peas, we don't serve a native grown pea, that is, a Georgia grown pea, at the county jail. A man named Wilson did not die as the result of rotten food and lack of medical attention at the jail. I wouldn't want to say I remember the name exactly, but a man named Wilson did die at the jail, we were looking at the records a while ago, and if I remember correctly, it has been a little bit better than two months ago. Just as soon as we find they are dead, we notify the undertaker and they come and get him immediately, as soon as they can get them out. There has been no complaint of men dying from lack of attention that I know of, I think I would have known if there had been. I remember Angelo Herndon and recall his period of incarceration; he was not subjected to any inhuman treatment whatever, he was not subjected to any rotten food, I remember going to him and talking to him personally about his food, he wrote a letter out to a friend, I went to him and says, "Angelo, aren't you getting the same food the rest of the boys in the cage are getting?" He says "yes;" I says "well, what's wrong with it?" He says, he wanted something, of course, that the county didn't furnish; I says "well, we can't give you any extra variety of food, we give you good wholesome food here, the same as I eat myself

and every prisoner in the jail gets the same food," and he says to me then well, the food was all right, but he wanted something different; members of the sheriff's force eat the same food furnished the prisoners, and I myself eat the same.

Cross-examination:

I do not confine myself while at the jail solely to food. I have other duties to perform. Whenever I feel like it, I eat at the jail, this morning, I ate breakfast the same as the prisoners did. There is not one iota of difference [fol. 135] between the preparation of the food for the prisoners and food for the officials, unless I buy it myself, ham or something like that; I mean, at times, I go out and purchase food and come back and cook it myself, and we allow prisoners the same privilege, too, whenever they want anything we'll order it for them if they have the money, if they want a chicken or ham or eggs or anything like that, if they tell me, "Mr. Turner, will you get me a chicken?" I'll say "yes," and get it and prepare it for him, we furnish anything they want. I had a conversation one day with Angelo Herndon, he did not express to me any objections to the condition of the food, he said the variety of the food, he wanted something different, and I told him "we give you stewed fruit, stewed peaches or prunes, if the doctor says give you milk, I'll give you milk, he did not tell me that the rocks and foreign matter in the food was such that he couldn't eat it. I do not know of any inhuman treatment at the jail, there is none, unless a man—if you call it inhuman, whereby if he violates the prison rules, he is locked in a cell to punish him that way, we do that sometimes where they are unruly, that's the form of punishment, but putting them in the cell, locking them in the cell to themselves for twenty four hours, but they are fed their food right on. I have never heard of any official at the jail exercising inhuman treatment to any prisoner. I spend anywhere from eight to sixteen hours a day at the jail. In the jail there is no discrimination whatever between negro and white prisoners, as to treatment, of course, they are segregated, they are put in cages, and the negroes get the same treatment the white prisoners get, every cage is constructed alike, there is no difference. I have had objections to the

conditions of the food, for instance, we may serve collards or cabbage, well, they don't like it, don't like cabbage, I wont hear so much from the colored as from the whites, we served collards two days in succession last week, some of the white boys didn't like it. If I find one dead, I im-
[fol. 136] mediately notify the jailer, he notifies the undertaker to come and get him, and as soon as the undertaker comes he is taken out of the jail, I would consider that a part of my duties, or any other officials. I make rounds of the building every day, I don't make rounds particularly to see whether there are dead bodies or not; it isn't possible for me to tell in every instance after a person dies, how quickly his body is gotten out of the jail, that depends on how long it takes the undertaker to get there; it isn't possible for a person to die there and two or three days expire before his body is obtained, there has never been a case of that kind; the system at the jail that makes that impossible is because, as I stated, as soon as we find there is a dead body in one of the cell blocks we notify the undertaker immediately and he comes and gets it in just a few minutes. The cells and conditions there are always sanitary, as much as possible, at times, in some of the cell blocks, it isn't as clean as others, we have to depend on the man himself largely to help us keep the place clean. Every cell is ventilated exactly alike; the ventilation pipes on the east wing, it comes from the north and south, and on the west, it's the same way, on the north and south, it comes from east and west. I have never known of any case where a prisoner's health was impaired due to unsanitary conditions of the jail, of course, we don't claim it is a hotel, we claim it is a county jail and kept in as good condition as it can be kept, considering its age; as to whether it is now unfitted for the use of prisoners, considering the age of the jail, there's lots worse in the country, and there are some jails that are more modern.

Redirect examination:

The jail has been overcrowded with prisoners during
[fol. 137] the past six months, the normal capacity of the jail is about, I would say, 480, that includes families' quarters and all; a few days ago they had 486, it has been up to maximum capacity for the past few months, and

sometimes over the maximum amount, take first and second, east it is for colored, three and five for white, and sometimes we have to really double them up in one of the east wings, or maybe the west wing. There are available for prisoners a county doctor and a government doctor. Doctor Blalock, is the county doctor, and I forget this government man's name, he is a new man, he has been down there a couple of months. Doctor Blalock, is supposed to make a round of the building every day, he comes every day, sometimes he comes twice, visits them and gives treatments, goes from cage to cage and says "Who wants to see the Doctor?" and if I am in one I say "I do," and if it is necessary they take me up to the clinic on the fifth floor, and administers to me the best he can, every man there can see the doctor if he wants to let the doctor know he wants to see him. We have a hospital ward at the jail, we have a clinic there, a room fourteen feet square.

Recross-examination:

We have a hospital ward—we call it a hospital ward but it is seldom used for that purpose now; where a colored man gets sick we try to segregate them the best we can, we have a cell block there set aside for that purpose; there is no colored hospital ward, this hospital ward, as I say, is seldom used for sick people, it is used for men who sleep there, we have a room, as I say, called a white hospital ward, but the clinic, the white fellows use, and colored fellows use it, to; I said to Mr. LeCraw that we had a hospital ward but it is seldom used for sick people, as I stated, it is used for the boys making time, serving sentences in jail, they occupy this room to sleep in. What I call the [fol. 138] white hospital ward is not the same thing I call the negro hospital ward, it is a cage; white prisoners and colored get the same treatment, as far as the clinic is concerned, they go to the clinic, and the doctor takes the white and colored to the same clinic and waits on them. As to the places they are kept, the white prisoners and the colored prisoners are kept in two different types of places, the colored in the cage and the white in what we call the white hospital ward. For your benefit, I may say, if the judge will pardon me, we have gone so far as to take the colored fellows there when they were sick and in need of

attention and put them in the white hospital ward, put beds in the hall and everything, and wait on them the best we possibly could, there has never been a colored man in that jail that suffered for want of attention if we knew it, he gets as good treatment as the white man does. We have a white hospital ward and have a cage used for sick negro prisoners, they have to be very sick to be put in the white hospital ward, a white prisoner, if there is room for him there, he is taken there, he generally goes to the Grady Hospital; as to how sick you have to be to be put in the white hospital ward, that's up to the doctor; I know that the doctor, when he comes there, is supposed to treat every prisoner that needs treatment, and to the best of my knowledge, he does, I'm not with him all the time, I say he is supposed to, and to the best of my knowledge, he does. As I say, it is part of my work, or any official's, to point out prisoners to be treated, if a man needs medical attention, to do the best we can, any man who needs medical attention or anything else.

R. N. Holland, sworn in behalf of the State, testified:

I am the jailer in charge at the jail of Fulton county; I am there from 7:00 in the morning to 3:00 and 3:30 in the evening. A man named William Wilson did not die there [fol. 139] from rotten food and want of attention, I recollect the instance of the death of William Wilson; I came to the jail on that morning, on September 10, I think it was, they called me from home, I told them to send his body to Howard's undertaking place, the man making his rounds, he found the man, the doctor was waiting on him, Doctor Blalock, county doctor, can tell you the same thing; he hadn't been dead but a few minutes, something like that, I do know it was not absolutely any period of days. As to whether or not rotten food is given to the prisoners, I went down there Sunday morning, early. Saturday night I was there and ate my breakfast Sunday morning in the kitchen, and I should say it is not rotten, because I ate my breakfast there last Sunday morning, the same food, sausage and biscuit and coffee, I ate breakfast in the jail Sunday morning, because I was called there Saturday night at 12:00 o'clock. I recollect the period that this defendant, Angelo Herndon, was a prisoner there at the jail; he

was treated just like any other colored prisoner in the Fulton county jail, they are all treated the same, he was treated just like any other colored man, up in what we call the first east and is fed *the rest* as the rest of them; he was fed, I should say, just ordinary common food, just good food like they serve to the prisoners all the time.

Cross-examination:

I am acqu-inted with the conditions of the jail in general, I should be, I have been there sixteen years. I remember Wilson dying at the jail, I remember when they had called me at the jail when he died; they got his body out of the cell back there in the cell block where he died, I don't remember the number of the cell; I don't know whether there was anybody else in the cell w-*hen* him; I didn't go back there to look and see, because he was moved out when I got there. I did not tell the defendant, Herndon, that he had better get out of town after he got out of jail, I had no reason for telling that. I absolutely did not make any [fol. 140] threats of any sort about Herndon, I don't think I ever spoke to the man more than two or three times while he was there. With regard to the approximate size of the cells, there's two sleeping bunks in the cell, the exact size I don't know, but there's plenty of room in there, there is a commode in there, some of them, and wash basin, the commode is inside of the cell, all of the cells—well, I won't say every cell, either, there might be some cells where they haven't. The food there is not rotten, as I say, I ate breakfast myself there Sunday morning, the same food the prisoners were served. They all receive the same treatment. We don't make any distinction except in the case of murder, a fellow sentenced — the electric chair, we put them in some of the smaller cages. As to whether we have a white hospital ward, we have a ward where a lot of trusties sleep, but where a man is sick, sometimes we put him there. We do not have a colored ward, we used to have but we don't now, I would say it was somewhere back in 1925 or 1926 that we had one, we don't have a hospital ward there because we don't have occasion to have them. After a prisoner dies, his body is gotten out very quickly by the undertaker, as soon as we call there is one there in less than thirty minutes; I couldn't tell you how much time transpires between the death and the time we call the

undertaker, because when the man makes his round with the flashlight he goes to every cell block, at least every hour; it is possible for him to walk by a cell and see a man on the cot and think he is sleeping when he is dead, a man died in jail last week, and a man sleeping right -side of him found him dead—the man wanted to give him his coffee and called for him, and the man lying in bed went and shook him and he said "Why, this man's dead," but the man was up at 4:00 o'clock when they called the prisoners to come out, and that was 6:00 o'clock, and he was in Howard's undertakers place before seven o'clock. It could not be possible for a man to die there and a day or so [fol. 141] elapsed without some deputy sheriff or somebody knowing he was dead, no such thing as that is possible; it is possible for a prisoner to send word that — cell-mate is dead, but I have got men that don't do anything else but go around them cell blocks, not looking for dead bodies especially, but looking around there to see what is going on. If I have any objections as to the unsanitary conditions of the jail, I investigate it, I always investigate, if I got any complaint whatever, I got a complaint from this man you are speaking about, from some foreign organization, that he wanted ham and eggs for his breakfast, I got that and I went and told him he would be served his breakfast just like anybody else, just whatever the jail feeds. As to whether the jail food is at all times free from such matter that would make the prisoners ill, I know it is good food, there is no fancy food, there is no fashionable stuff cooked for anybody; they buy good flour, as I stated, I had breakfast there Sunday morning, I eat there very often, I eat my dinner time and time again, day in and day out, dinner is set down there in the kitchen, the same food; I do not go out and buy food and bring it back to be cooked, if I go out and get food at all, I go out and get cooked food, I don't go out and get cooked food often, I do whenever I want to, and I can tell you another thing, if a prisoner in there has got something he wants cooked, we'll cook it for him. This fellow Wilson died there, if he had been bad off we would have moved him out and put him somewhere else and taken care of him, we do that, and put men to stay with them night and day, we put them sometimes in the hospital room—there's a room up there—a man bad off, and a doctor looks at him and says he is bad off, I move him; this man, Wilson, wasn't bad off, he died very sud-

denly; the doctor is here, he will tell you what he died with, my recollection is it was heart failure.

[fol. 142] Dr. J. C. Blalock, sworn in behalf of the State, testified:

I am a county physician of Fulton county. I have been a practicing physician since 1921; I was stationed at the Grady Hospital for 20 months prior to my present work, and after that I was a practicing physician here in the city of Atlanta, in the general practice since that time; I have been county physician two years the 1st of January. I go to the jail usually every day; describing a typical day's work on my trip to the jail, we have a man that goes around each cell and checks up on the number sick and when I got around, if there's any of them that isn't able to go to the hospital, then I prescribe for them in the cell, if they are able to get up there, they are carried up there and I prescribe what treatment is necessary, if not, I treat them in the cell, and if a man is sick, there is a man in charge, which is another prisoner, of course, if he is bad sick or anything we think mighty serious, of course we send this patient out to the hospital, but some lingering illness which he has had for several months before he came in, he is cared for by another prisoner that is in charge of this department, we try to pick one intelligent enough to handle the cases. I recollect the incident of a prisoner named William Wilson who died in jail; I had been treating him several days prior to his death; he had a heart condition, he had a condition what we call a hypertension and arteriosclerosis, which is a hardening of the arteries, and had a valvular heart disease, he had consulted me for that; I think my record shows September 10, I was called to the jail when he died and I saw his body; I had treated him the afternoon before for this heart trouble.

Cross-examination:

I make a round practically every day, I don't go every day but I did at that time, because we had some illness. [fol. 143] I make a round practically every day, and then I have a man in the jail who checks up each and every day, and makes report to me; he isn't a doctor himself; as to

whether it is possible for a man to be ill on one of the days I am not there and die for the lack of medical treatment, it is possible a man can die standing up, if that answers your question, it isn't ever any time they can't get me within a very short period of time, in fact, I can be gotten more quickly than they can get their home, because my office keeps in touch with me and I make as much as three and four trips a day, I make a round in the morning, and less than two hours — I have gone I will be called back to see the same man, I make a call each day to the front, and generally make a complete round of the cells every day, but it is checked up every morning that goes by, every cell is checked, and the question is asked if there is anybody sick, if there is anybody sick officers pass all during the day, I think about a period of about two hours, something like that, and if there is anybody sick the officer goes and makes a trip to the front office and the front office calls me. This man that makes the round in my absence and reports to me is not a physician. I remember the case of William Wilson; I treated him before he died, I saw him several times, I don't remember just how many days, but I saw him several times, almost from the time he came in until he died, I would say, two weeks or three weeks, I know it was that long, because I saw him every day for several days. He died from heart disease, I mean, that's what my diagnosis was, of course, I'm not infallible. No autopsy was performed on the body, I asked if they wanted one and I got an answer no—I don't know who it was. As to whether I would consider Wilson a pretty sick man up to the time he died, I consider anybody that has got a heart disease pretty sick, but they go along ten or fifteen years with it, or probably longer than that, I have observed some longer than that myself. As to whether my treatment dur-
[fol. 144] ing the two weeks he was there aided him or bettered his physical condition or prolonged his life, the answer to that is the death, I would say not, but he said he felt better, he told me that, at least, but that isn't necessarily that he was better, I treated him in his cell. There is not a hospital or negro ward, we have places they put them in, it depends on the condition they are in, we have four or five there that isn't able to be up, and we have a place to keep them and keep a man with them night and day, he takes care of them and gives them the medicine whatever I prescribe at the time. I did not consider

Wilson's condition a dangerous thing, I didn't know what was going to happen, that is the case with any heart condition, and I told him what could happen. I treated him in the cell because he was able to be around, he had an entire bunk by himself and had a man to care for him. I don't think the white hospital ward would lend itself to the bettering of the physical condition of sick white prisoners, I have patients in practically every ward over there; as to whether it is an improvement over the regular cells, the only thing I can say would be, you might figure it would be a little better air on account of better ventilation, but I don't consider it worth any more to the patient; fresh air is vital to anybody; it isn't more vital to a sick man than to a well man, I think fresh air is vital to anybody, or at least, helpful, but I don't consider it more vital to sick than to well people, it couldn't be; if I had my way about it personally—in one of them—I would as soon be in one of the cells as in the hospital, as I say, there is a little bit better ventilation, that's the only thing that you could say is better about it; I stated I consider it is a better condition, so far as air, than the rest of the cells. As to whether there is no negro ward which has even that advantage, I think the one we have right now, I don't think there is much difference in the ventilation; it isn't fixed up exactly the same way the white hospital ward is, there isn't any other [fol. 145] cell fixed up exactly like you would call the hospital ward, that is the only one we have, but as far as the sick man is concerned, it is just as good, I don't see any difference. I did not think Wilson was sick enough to be put in the hospital ward, not any more than he was, I don't see that I could have improved on the place he was in, that is, inside of the jail; he had as much air as he needed, I just spoke of the ventilation and the light, I think he would get enough air any place he would have went. Two prisoners is as many as I have ever seen in one cell room, they are double-decked—two beds, one can be up and one down. The jail is not overcrowded, as far as the sick department is concerned. One man was living in the same cell with Wilson, I don't know who he is, I don't take the name, except of the sick, that's the only names I take.

Redirect examination:

There is a drug supply there at my disposal all the time, anything that I want, I have a regular drug room, about as

well equipped a room as you'll find anywhere in Atlanta. If I need any drugs in the treatment of a prisoner, I don't have to go anywhere for them, I have them there.

Recross-examination:

The prisoners don't have to pay for any medicines; we give them pills whenever they need them, we average about 5,000 pills per month, they don't pay for anything, nor for their medical attention.

Testimony closed.

* * * * * * *

[fol. 146] In Superior Court of Fulton County

No. 37812

Angelo Herndon

vs.

State of Georgia

Indictment for Attempting to Incite Insurrection

Brief of the Documentary Evidence—Filed July 6, 1933

The State introduced the following documents which were identified by witness F. D. Watson as being documents found in the personal possession of defendant Angelo Herndon, in a box under his arm, at the time of his arrest:

Document No. 1. Receipt Book, containing two receipts filled out with pencil and 36 blank receipts. The first receipt filled out is as follows: "July 8th, 1932. Received from Julius Klarins Three and 00/100 dollars for subsidy, $3.00. Angelo Herndon."

The second receipt bears the same signature and is the same as the first except the date, which is: "July 5th, 1932."

Document No. 2: Receipt Book, containing five receipts filled out with pencil, nine blank receipts, and 33 stubs, some filled out and some blank stubs. Receipts are as follows:

[fol. 147] "6/20, 1932. Received from International Workers Order Five and no/100 dollars for relief work. $5.00. Otto Hall."

"6/26, 1932. Received from M. Zipper Two & 00/100 dollars for 10-104 and 1-100 stamps. $2.00. Angelo Herndon."

"June 19th, 1932. Received from Julius Klarins, etc., Three 100/100 Dollars for subsidy. $3.00. Angelo Herndon."

The next receipt is same as last one above except date—June 26, and is signed "Angelo Herndon." The 5th receipt is signed "Otto Hall" and is same as the Otto Hall receipt (above) except date—July 5, 1932.

Document No. 3. Membership Book No. 51088 of Communist Party of the U. S. A., being a booklet of 16 pages, with various printing upon all pages, and the first page filled in with ink, as to names and dates. The first page of this one is filled out so as to be as follows:

"Communist Party of the U. S. A.

(Section of the Communist International)

Membership Book No. 51088

for

Name: Walter Leathers.
Date admitted to Communist Party: 7/10/32.
Entered Revolutionary Movement: ——.
District 17, City, Atlanta.
Section 2. Shop or Street Nucleus: ——.
Signature of member (in ink): —— ——.
This book was issued on (date) 7/10/32.
Nat Ross. (Signature of District Organizer and Party Seal.)

No Party Membership Book valid unless it has party seal stamped on.
Issued by the Central Committee, C. P. U. S. A.

[fol. 148] (Stamp is affixed, which reads as follows: "Unemployment Initiation Communist Party of the U. S. A. 10¢ Stamp 10¢.)

(This and the other membership books which follow, being Documents numbers 4 to 10 inclusive, all have the following printed matter therein:)

"Extracts from the Statutes of the Communist Party of the U. S. A.

§ 3—Membership

"1. A member of the Party can be every person from the age of eighteen up who accepts the program and statutes of the Communist International and the Communist Party of the U. S. A., who becomes a member of a basic organization of the Party, who is active in this organization, who subordinates himself to all decisions of the Comintern and of the Party, and regularly pays his membership dues.

"4. * * * (relates to transfers from one unit to another).

"6. Every member of the Party who is eligible to be a member of a trade union must become a member of the union to which he is eligible."

§ 4—The Structure of the Party

"1. The Communist Party, like all sections of the Comitern, is built upon the principle of democratic centralization. These principles are:

(a) Election of the subordinate as well as the upper Party organs at general meetings of the Party members, conferences and conventions of the Party.

(b) Regular reporting of the Party committees to their constituents.

(c) Acceptance and carrying out of the decisions of the higher Party committees by the lower, strict Party discipline, and immediate and exact applications of the decisions of the Executive Committee of the Communist International and of the Central Committee of the Party.

[fol. 149] (d) Any Party committee whose activities extend over a certain area is considered superior to those Party organizations whose activity is limited only to certain parts of this area.

(e) The discussion on basic Party questions or general Party lines can be carried on by the members only until the Central Committee has decided them. After a decision has been adopted at the congress of the Comintern, the Party convention, or by the leading Party committee, it must be carried out unconditionally, even if some of the members or some of the local organizations are not in agreement with the decision.

"2. The highest authority of each unit of the Party is the general meeting of Party members, conference or Party convention.

"3. The membership meeting, conference or Party convention elects the leading committee which acts as the leading Party organ in the interim between the membership meetings, conferences or conventions and conducts the work of the Party organization.

§5—The Party Nucleus

"1. The basis of the Party organization is the nucleus (in factories, mines, shops, etc.) which all Party members working in these places must join. The nucleus consists of at least three members. Newly organized nuclei must be endorsed by the leading committee of the section in which the shop nuclei are organized.

"3. Party members who cannot be immediately affiliated with a shop nucleus shall join temporarily the street nucleus in the section of the city in which they reside, until it shall be possible to create a shop nucleus in the factory.

§12—Party Discipline

"1. The strictest Party Discipline is the most solemn duty of all Party members and all Party organizations. The decisions of the CI and the Party Convention of the CC and of all leading committees of the Party, must be promptly carried out. Discussion of questions over which there have been differences must not continue after the decision has been made.

[fol. 150] §13—Party Dues

"1. Each applicant for membership shall pay an initiation fee of 50c (Unemployed 10c), which shall be receipted

for by an Initiation Stamp furnished by the CC. Fifty per cent of the sum of the Initiation Stamp shall go to the National Office and 50% to the District Office.

"2. Each member shall pay dues weekly approximating 2% of his earnings, which shall be receipted for by dues stamps issued by the Central Committee. Dues Stamps shall be issued in five categories, as follows:

"All members receiving $15 per week wages or less (including housewives and working farmers) pay 10c dues weekly.

Over $15 and up to $25 per week wages shall pay 25c dues weekly.

Over $25 and up to $30 per week wages shall pay 50c dues weekly.

Over $30 and up to $40 per week wages shall pay 75c dues weekly.

Over $40 and up to $50 per week wages shall pay $1.00 dues weekly.

Members receiving over $50 per week wages, shall pay in addition to the regular $1.00 per week dues, additional dues (special tax) at the rate of 50c for each $5.00 (or fraction) of their weekly earnings above $50.00.

"3. The district organization shall purchase all dues stamps at 50% retail price; the district shall sell at 80% retail price to Sections; and the Sections shall sell them at 90% retail price to units.

"4. All local or district assessments or collections are prohibited except by special permission of the Polcom. Special assessments may be levied by the national convention or the CC. No member shall be considered in good standing unless he purchases such special assessment stamps.

[fol. 151] "5. Members unable to pay regular dues on account of unemployment, strikes, illness or similar reason, shall pay 2 cents per week.

"6. Members who are four weeks in arrears in payment of dues cease to be members of the Party in good standing. Members who are three months in arrears shall be stricken from the rolls. No member of the Party shall pay dues in advance for a period of more than six weeks.

"What is the Communist Party?

"The Party is the vanguard of the working class and consists of the best, most class conscious, most active, the most courageous members of that class. It incorporates the whole body of experience of the proletarian struggle, basing itself upon the revolutionary theory of Marxism and representing the general and lasting interests of the whole of the working class, the Party personifies the unity of proletarian principles, of proletarian will and of proletarian revolutionary action. (From the program of the Communist International.)

"We are the Party of the working class. Consequently, nearly the whole of that class (in time of war and civil war, the whole of that class) should work under the guidance of our Party, should create the closest contacts with our Party. (Lenin.)

"On Discipline

"He who weakens, no matter how little, the iron discipline of the Party of the proletariat (especially during the period of dictatorship), effectually helps the bourgeoisie against the proletariat. (Lenin.)

"The Party as the best training school for working class leaders, is the only organization competent, in virtue of its experience and authority to centralize the leadership of the proletarian struggle, and thus to transform all non-Party working class organizations into accessory organs and connecting belts linking up the Party with the working class as a whole. (Lenin.)"

[fol. 152] The above described book also contains four pages with places blocked off for stamps, these pages being headed: "Membership Dues for 1932. The book also contains four pages blank except for the heading: "Assessment Stamps." The book also contains two pages headed: "Transfers" with blank places to enter: "Granted from ——" and "Accepted to ——."

Document No. 4: Membership Book No. 51069 of the Communist Party of the U. S. A., being a booklet of 16 pages, with printing therein the same as Document No. 3, except the first page, which is as follows:

"Communist Party of the U. S. A.

(Section of the Communist International)

Membership Book No. 51069

for

Name: A. O. Leathers.
Date Admitted to Communist Party: 7/10/32.
Entered Revolutionary Movement: ——.
District 17, City Atlanta.
Section 2. Shop or Street Nucleus ——.
Signature of Member (in ink): —— ——.
This book was issued on (date): 7/10/32.
Nat Ross. (Signature of District Organizer and Party Seal.)

No Party Membership Book valid unless it has party seal stamped on.

Issued by the Central Committee, C. P. U. S. A.

(Stamp is affixed, which reads as follows: "Unemployment Initiation Communist Party of the U. S. A. 10¢ Stamp 10¢.)

[fol. 153] Document No. 5: Membership Book No. 51092, being 16 pages, same as Documents No. 3 and 4, except that it is made out in the name: Nannie Leah Young.

Document No. 6: Membership Book No. 51093, being 16 pages, same as Documents No. 3 and 4, except that it is made in name: Wm. Harris Leathers.

Document No. 7: Membership Book No. 51090, being 16 pages, same as Documents No. 3 and 4, except that it is made in name: Mary Heed.

Document No. 8: Membership Book No. 52648, being 16 pages, same as Documents No. 3 and 4, except that it is made in name: Anna Mae Leathers.

Document No. 9: Membership Book No. 51089, being 16 pages, same as Documents No. 3 and 4, except that it is made in name: L. B. Benefield.

Document No. 10: Membership Book No. 51091, being 16 pages, same as Documents No. 3 and 4, except that it is made in name: Willie Wyatt.

Document No. 11: Membership Book No. 27168, being 16 pages, the printed part of which is the same as Documents No. 3 and 4, but the first page of which is as follows:

"Duplicate

Communist Party of the U. S. A.

(Section of the Communist International)

Membership Book No. 27168

for

Name: Otto Hall.
Date Admitted to Communist Party: March, 1921.
Entered Revolutionary Movement: 1920.
District 5, City, Covesdale.
Section Cove. Shop or Street Nucleus ——.
Signature of Member (in ink): —— ——.
[fol. 154] This Book was issued on (date) Duplicate.
Carl Price. (Signature of District Organizer and Party Seal.)

No Party Membership Book valid unless it has Party Seal stamped on.
Issued by the Central Committee, C. P. U. S. A.

(Rubber-stamp seal and symbol is imposed thereon, in red ink, part of the seal being illegible, but which is partly legible as follows: "Communist Party U. S. A.")

On two of the pages headed "Membership Dues", in this book, twelve yellow stamps have been fixed, reading: "Exempt Stamp, Communist Party of the U. S. A." On the first page headed "Transfers", in this book, appears an entry:

"Granted from Pittsburgh, District 5.
"Accepted to: Dist. 2, New York."

Document No. 12: Three pads of certificates of contribution to the Communist Party presidential election campaign fund, with stub attached to each certificate, a sample of said certificates and stubs being as follows:

(Here follows photolithograph of Certificate, side folio 154-A)

Each of the pads contains 42 such certificates, similar to the above except as to the amount in large red figures in the center. Some of the certificates are for $5, some $1, some 50¢ and some 25¢. The reverse side of all said certificates is as follows:

(Here follows photolithograph of reverse side of certificate, side folio 154-A)

Send this slip with the money to the one that gave you this book.

Received $_____ from

Name _____

Street _____

City _____ State _____

for the $100,000.00
Communist Election Campaign Fund

Book No. 1990

Received by _____

No. 1990

FOR WORKING CLASS UNITY IN THE ELECTION CAMPAIGN!
AGAINST THE HUNGER AND WAR OFFENSIVE OF THE CAPITALISTS!

FOR PRESIDENT

Wm. Z. FOSTER

COMMUNIST ELECTION FUND CERTIFICATE

This is to certify that

$5.00

has contributed the face value of this certificate to the election campaign fund of the Communist party of the U.S.A.

Wm Z Foster
James W. Ford

FOR VICE PRESIDENT

JAMES W. FORD

FOR THE WORKERS TICKET – CANDIDATES OF THE COMMUNIST PARTY – – AGAINST THE CANDIDATES OF THE BOSSES!

154-A

(Reverse)

[fol. 155] The outside of each of said pads, in Red paper, is as follows:

"Vote Communist and Support the $100,000.00 Communist Election Campaign Fund

"Vote Communist for

1. Unemployment and Social Insurance at the expense of the State and employers.

2. Against Hoover's wage-cutting policy.

3. Emergency relief for the poor farmers without restrictions by the government and banks; exemption of poor farmers from taxes and from forced collection of rents or debts.

4. Equal rights for the Negroes and self-determination for the Black Belt.

5. Against capitalistic terror; against all forms of suppression of the political rights of the workers.

6. Against imperialist war; for the defense of the Chinese people and of the Soviet Union."

(Inside the Red cover appears the following:

"This book is valuable. A serious responsibility rests with you in accounting for the certificates contained in this $100,000 Communist Election Campaign book.

"For all money received by you, give a certificate, which is the official receipt to the contributor. Fill in the information required on each stub.

[fol. 156] "Send the money with the stubs to the place from which you received this book. It is very important to do this promptly because we want to publish the names of all contributors in the Daily Worker."

On the back of each of said pads, in Red paper, is the following:)

"Every Worker a Communist Campaigner

Collect Everywhere

"Every dollar collected is a bullet fired into the boss class. The success of this campaign depends upon your efforts. Read and Subscribe to the Daily Worker."

Document No. 13. A booklet entitled: "The Communist Position on the Negro Question."

On the outside cover, in addition to above title, appears a map of the United States of America, under which is the following:

"Self-Determination for the Black Belt"

The map has a dark belt or strip appearing in it, beginning with a portion of Arkansas and Louisiana and extending eastward through the middle of Mississippi, Alabama and Georgia. Inside the State of Georgia this "Black Belt" includes a strip from west to east, the counties within the belt on the northern edge being Troup, Coweta, Fayette, Campbell (old) Clayton, Rockdale, Newton, Morgan, Clarke, Oglethorpe and Elbert. From this tier of counties the Belt extends southward through the middle of Georgia to and including the counties of Dooly, Wilcox, Dodge, Laurens and Johnson.

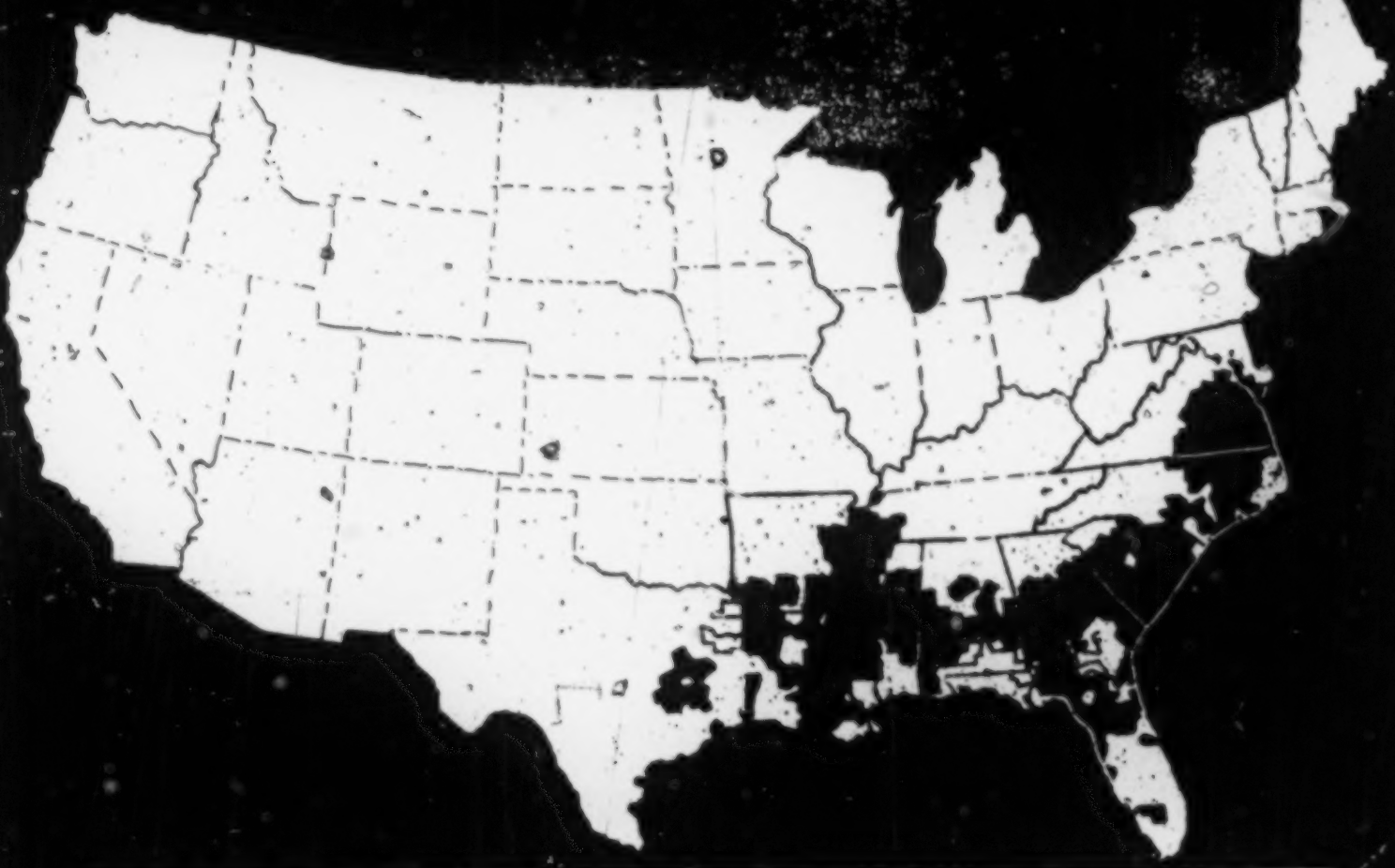
Leaving Georgia northeastward, the "Black Belt" extends through a substantial portion of South Carolina, North Carolina and Virginia, ending at the Chesapeake Bay.

A photographic reproduction of said map and booklet cover is as follows:

(Here follows photolithograph of side folio 157)

EQUAL RIGHTS FOR NEGROES

THE COMMUNIST POSITION ON THE NEGRO QUESTION



SELF-DETERMINATION FOR THE BLACK BELT

[fol. 158] On page 28 of this pamphlet appears the following:

"Our Demands in the South

"In the South, the first must be fearlessly developed against the thievery and robbery of the Southern capitalists and landlords; against their whole system of enslaving the Negroes based on Jim-Crowism and lynch terror. We must fight there not merely against inequality, but against the whole system by which this inequality is enforced.

"In the first place, our demand is that the land of the Southern white landlords for years tilled by the Negro tenant farmers, be confiscated and turned over to the Negroes. This is the only way to insure economic and social equality for the tenant farmers.

"Secondly, we proposed to break up the present artificial state boundaries established for the convenience of the white master class, and to establish the state unity of the territory known as the 'Black Belt,' where the Negroes constitute the overwhelming majority of the population.

"Thirdly, in this territory, we demand that the Negroes be given the complete right of self-determination; the right to set up their own Government in this territory and the right to separate, if they wish, from the United States.

"Around these demands for the Negroes, as I have outlined them here—with the revolutionary white workers in the very forefront of the struggle—the unity of white workers, small farmers and the Negro masses can and must be established.

"Not Promises; But Action

"But the Negroes have listened to many promises. Every political faker has promises equality and freedom. The white workers can win the confidence of the negro masses, not by promises, but by action. We must ourselves be in the forefront of the struggle for negro rights. We must ourselves jump at the throat of the persecutors of the negroes. We white workers, in the first place, must enforce the demand—'Death to the Lynchers!'

[fol. 159] "The Communist Party has demonstrated in action that it does not merely speak for Negro rights; it is everywhere in the forefront of the actual struggle to force the granting of real equality now for the negro peo-

ple. This has been shown in the Scottsboro case; it has been shown in hundreds of other cases in all sections of the country.

"Comrades, in conclusion, as a further step in convincing the masses of the revolutionary sincerity of the Communist Party in the fight for equality for the Negro people, I propose that we endorse as our candidate for Vice-President, a negro worker. I have a candidate to propose—a candidate long active in the revolutionary working class movement—an ex-serviceman, a member of the Trade Union Unity League, a member of the Communist Party. This candidate knows the lynchers. His own grandfather was lynched by the southern bosses. He has long been a most active fighter against the enslavement of his people.

"I wish to nominate for Vice-President of the United States, as our running mate with William Z. Foster, this leader in the struggle for the emancipation of the toilers—white and negro—James W. Ford of Alabama."

(The above is incorporated in the booklet as a part of the nominating speech of C. A. Hathaway, "delivered at the National Nominating Convention of the Communist Party proposing James W. Ford of Alabama for Vice-President of the United States.")

(On the first page of this booklet appears:)

"The documents presented in this pamphlet are the result of the very best and most careful thought, study and experience of our Party. The correct line of our Party on this question has been hammered out in years of bitter struggle—struggle with the enemies of Bolshevism. • • •

"But in the furious struggle against our enemies, and against the influence of these enemies upon our own ranks; with the indispensable guidance of the Communist International—our Party has hammered out its Bolshevik line on the negro question."

[fol. 160] (Among the literature set forth in this booklet appears also the following:

"Resolutions of the Communist International on the Negro Question in the United States

1. Resolution of Communist International, October, 1930

"1. The Communist Party of the United States has always acted openly and energetically against Negro oppres-

sion and has thereby won increasing sympathy among the Negro population. In its own ranks, too, the Party has relentlessly fought the slightest evidences of white chauvinism, and has purged itself of the gross opportunism of the Lovestonites. According to the assertions of these people, the 'industrial revolution' will sweep away the remnants of slavery in the agricultural South, and will proletarianize the negro peasantry, so that the negro question, as a special national question, would thereby be presumably solved, or could be put off until the time of the socialist revolution in America. • • •

"Furthermore, it is necessary to face clearly the inevitable distinction between the position of the negro in the South and in the North, owing to the fact that at least three-fourths of the entire negro population of the United States (12,000,000) live in compact masses in the South, most of them being peasants and agricultural laborers in a state of semi-serfdom, settled in the 'Black Belt' and constituting the majority of the population, whereas the negroes in the northern states are for the most part industrial workers of the lowest categories who have recently come to the various industrial centers from the South (having often even fled from there).

"The struggle of the Communists for the equal rights of the negroes applies to all negroes, in the North as well as in the South. The struggle for this slogan embraces all or almost all of the important special interests of the negroes in the North, but not in the South, where the main Communist slogan must be: The right of self-determination of the negroes in the black belt.

[fol. 161] These two slogans, however, are most closely connected. The negroes in the North are very much interested in winning the right of self-determination of the Negro population of the Black Belt and can thereby hope for strong support for the establishment of true equality of the Negroes in the North. In the South the Negroes are suffering no less, but still more than in the North from the glaring lack of all equality; for the most part the struggle for their most urgent partial demands in the Black Belt is nothing more than the struggle for their equal rights, and only the fulfillment of their main slogan, the right of self-determination in the Black Belt, can assure them of true equality. • • •

"It is the special duty of the revolutionary Negro Workers to carry on tireless activity among the Negro working masses to free them of their distrust of the white proletariat and draw them into the common front of the revolutionary class struggle against the bourgeoisie . . .

"The slogan of the right of self-determination occupies the central place in the liberation struggle of the Negro population in the Black Belt against the yoke of American imperialism. But this slogan, as we see it, must be carried out only in connection with two other basic demands. Thus, there are three basic demands to be kept in mind in the Black Belt, namely, the following:

(a) Confiscation of the landed property of the white landowners and capitalists for the benefit of the negro farmers. The landed property in the hands of the white American exploiters constitutes the most important material basis of the entire system of national oppression and serfdom of the Negroes in the Black Belt. More than three-quarters of all Negro farmers here are bound in actual serfdom to the farms and plantations of the white exploiters by the feudal system of 'share cropping.' Only on paper and not in practice are they freed from the yoke of their former slavery. The same holds completely true for the great mass of black contract laborers. Here the contract is only the capitalist expression of the chains of the old slavery, [fol. 162] which even today are not infrequently applied in their natural iron form on the roads of the Black Belt (chain gang work). These are the main forms of present Negro slavery in the Black Belt, and no breaking of the chains of this slavery is possible without confiscating all the landed property of the white masters. Without this revolutionary measure, without the agrarian revolution, the right of self-determination of the Negro population would be only a Utopia or, at best, would remain only on paper without changing in any way the actual enslavement.

(b) Establishment of the State Unity of the Black Belt. At the present time this Negro zone—precisely for the purpose of facilitating national oppression—is artificially split up and divided into a number of various states which include distant localities having a majority of white population. If the right of self-determination of the Negroes is to be put into force, it is necessary wherever possible to bring together into one governmental unit all districts of

the South where the majority of the settled population consists of negroes. Within the limits of this state there will of course remain a fairly significant white minority which must submit to the right of self-determination of the negro majority. There is no other possible way of carrying out in a democratic manner the right of self-determination of the negroes. Every plan regarding the establishment of the negro state with an exclusively negro population in America (and of course still more exporting it to Africa) is nothing but an unreal and reactionary caricature of the fulfillment of the right of self-determination of the negroes, and every attempt to isolate and transport the negroes would have the most damaging effect upon their interests. Above all, it would violate the right of the negro farmers in the Black Belt not only to their present residences and their land, but also to the land owned by the white landlords and cultivated by negro labor.

(c) Right of Self-Determination. This means complete and unlimited right of the negro majority to exercise gov- [fol. 163] ernmental authority in the entire territory of the Black Belt, as well as to decide upon the relations between their territory and other nations, particularly the United States. It would not be right of self-determination in our sense of the word if the negroes in the Black Belt had the right of self-determination only in cases which concerned exclusively the negroes and did not affect the whites, because the most important cases arising here are bound to affect the whites as well as negroes. First of all, true right to self-determination means that the negro majority and not the white minority in the entire territory of the administratively united Black Belt exercises the right of administering governmental, legislative, and judicial authority. At the present time all this power is concentrated in the hands of the white bourgeoisie and landlords. It is they who appoint all officials, it is they who dispose of public property, it is they who determine the taxes, it is they who govern and make the laws. Therefore, the overthrow of this class rule in the Black Belt is unconditionally necessary in the struggle for the negroes' right to self-determination. This, however, means at the same time the overthrow of the yoke of American imperialism in the Black Belt on which the forces of the local white bourgeoisie depend. Only in this way, only if the negro population of the Black Belt

wins its freedom from American imperialism even to the point of deciding itself the relations between its country and other governments, especially the United States, will it win real and complete self-determination. One should demand from the beginning that no armed forces of American imperialism should remain on the territory of the Black Belt.

7. As stated in the letter of the Political Secretariat of the E. C. C. I. of March 16, 1930, the Communists must 'unreservedly carry on a struggle' for the self-determination of the negro population in the Black Belt in accordance with what has been set forth above. It is incorrect and harmful to interpret the Communist standpoint to mean that the Communists stand for the right of self-determination of the negroes only up to a certain point but not beyond this, [fol. 164] to, for example, the right of separation. It is also incorrect to say that the Communists are only to carry on propaganda or agitation for the right of self-determination, but not to develop any activity to bring this about. No, it is of the utmost importance for the Communist Party to reject any such limitation of its struggle for this slogan. Even if the situation does not yet warrant the raising of the question of uprising, one should not limit oneself at present to propaganda for the demand, 'Right to Self-Determination,' but should organize mass actions, such as demonstrations, strikes, tax boycott movements, etc.

"It would be a mistake to imagine that the 'right of self-determination' slogan is a truly revolutionary slogan only in connection with the demand for complete separation. The question of power is decided not only through the demand of separation, but just as much through the demand of the right to decide the separation question and self-determination in general. A direct question of power is also the demand of confiscation of the land of the white exploiters in the South, as well as the demand of the negroes that the entire Black Belt be amalgamated into a State unit.

Hereby, every single fundamental demand of the liberation struggle of the negroes in the Black Belt is such that—if once thoroughly understood by the negro masses and adopted as their slogan—it will lead them into the struggle for the overthrow of the power of the ruling bourgeoisie, which is impossible without such revolutionary struggle.

One cannot deny that it is just possible for the negro population of the Black Belt to win the right to self-determination during capitalism; but it is perfectly clear and indubitable that this is possible only through successful revolutionary struggle for power against the American bourgeoisie, through wresting the negroes' right of self-determination from American imperialism. Thus, the slogan of right to self-determination is a real slogan of National Rebellion which, to be considered as such, need not be supple- [fol. 165] mented by proclaiming struggle for the complete separation of the negro zone, at least not at present.

(d) Communists must fight in the forefront of the national liberation movement and must do their utmost for the progress of this mass movement and its revolutionization. Negro Communists must clearly dissociate themselves from all bourgeois currents in the negro movement, must indefatigably oppose the spread of the influence of the bourgeois groups on the working negroes. • • •

(e) One must work with the utmost energy for the establishment and consolidation of Communist Party organizations and revolutionary trade unions in the South. • • •

11. It is particularly incumbent on negro Communists to criticize consistently half-heartedness and hesitations of the petty-bourgeois national-revolutionary negro leaders in the liberation struggle of the Black Belt, exposing them before the masses. • • • Simultaneously, negro Communists must carry on among the negro masses an energetic struggle against nationalist moods directed indiscriminately against all whites, workers as well as capitalists, Communists as well as imperialists. Their constant call to the negro masses must be: Revolutionary struggle against the ruling white bourgeoisie, through a fighting alliance with the revolutionary white proletariat!"

(In another portion of said Booklet, "The Communist position on the negro question" appears an article by Harry Haywood, entitled: "The Theoretical Defenders of White Chauvinism in the Labor Movement", reprinted from "The Communist" for June, 1931. A portion of this article is as follows:)

"The correctness of the program of the Communist International on the Negro Question is conclusively proven in

the present crisis by the response of the negro masses to the slogans of the Party, and by their increasing participation together with the white workers in joint struggles [fol. 166] against the capitalist offensive. It is likewise proven by the vicious repressive measures of the ruling classes against the activities of the Communist Party and other revolutionary organization among negroes.

"It is not surprising, therefore, that the revolutionary program of the Communist Party is meeting the sharpest attacks, particularly at the present time, on the part of all chauvinist forces from the Fish Committee down to the Lovestone renegades. • • •

"But the white revolutionary workers, who understand the powerful revolutionary potentialities inherent in the struggle of the negro masses, would answer in the following manner: 'This land on which you and your ancestors have slaved for centuries rightfully belongs to you. The bosses' government in this territory is a government of foreign slave-drivers; it is our enemy as well as yours. We recognize and support your right to organize your own government, to elect your officials, to organize your own militia, and your unqualified right to separate from the United States. Moreover, we, the white revolutionary workers, will prove our sincerity right now, at the present time, by actively supporting and helping to organize a struggle to bring about those conditions in which you will be able to exercise your right to self-determination.'"

(In another portion of said Booklet appears an article by Earl Browder entitled: "For National Liberation of the Negroes! War against White Chauvinism!" being labeled "Extract from a report on behalf of the Central Committee, Communist Party of U. S. A. on the subject of the struggle for Negro rights in connection with the relation between white and negro students in the school.")

"Comrades: I have purposely refrained from preparing a formal report, my purpose being to give the views of the Central Committee as informally as possible. • • •

"Among the political advances of our Party during 1931, the most decisive was precisely in the struggle for negro rights. In what did these victories consist? In this, that [fol. 167] the Party raised concretely the issues of negro rights on the basis of the Leninist program on the national

question, and aroused masses of negroes and also of whites, to struggle upon these concrete issues. The masses have responded to our program, and in the struggle there has begun a sharp class differentiation among the negroes.

"Our Party for many years has raised the slogan of struggle for negro rights. Why have we only now begun to arouse mass struggles? There are objective and subjective reasons for this. First, the results of the crisis, which fall heaviest upon the negro masses, including the sharpening repression and lynch terror. The second includes primarily the improved work of our Party, based upon clarification of its political line and its concretization in immediate issues and daily struggles. * * *

"The purpose of our work on the negro question is to establish unity of white and black proletariat in a common struggle to overthrow capitalism, and the leadership of the proletariat over the negro masses in the struggle for their national liberation. * * *

"We are Bolsheviks, members of a fighting Party of the working class, who know that the only road to the revolutionary overthrow of capitalism and the establishment of Communism is through welding together the iron unity of class idealogy which penetrates into our ranks, as the prerequisite to the effective struggle against the class enemy physically. * * *"

Document No. 14: The July, 1932, issue of "The Communist", labeled "A Magazine of the Theory and Practice of Marxism-Leninism", published monthly by the Communist Party of the United States of America." The contents of said magazine are the following articles:

"Concretize and Strengthen the Anti-War Struggle"	Editorial
"Place the Party on a War Footing"	By Earl Browder
Contradictions Among the Imperialists and Conflicts on the Pacific Coast	By N. Terentyev
[fol. 168] Yankee Imperialist Intervention against the Chinese Revolution	By M. James
The Revolutionary Example of the Japanese Toilers	By Kumamoto
Will Imperialist War bring back Prosperity?	By Robt. W. Dunn

The Philippine Islands in the War Area ..... By William Simons
The Struggle against the Provocateur
The Defense of the Fatherland ..... By V. I. Lenin"

(The first article, editorial, contains the following:)

"The capitalist class of the United States finds itself at the present time in the process of 'growing into' a new world war, into the war against the Soviet Union. Already at the XVII Conference of the Communist Party of the Soviet Union, Comrade Moletov has pointed out that the peculiar characteristic of the present situation is the fact that the ruling classes, actively supported by the social-fascist leaders, are applying the tactic of 'peacefully growing into' war. It is this peculiar tactic, followed by world capitalism under the screen of the most intense pacifist maneuvers, that we must concentrate on exposing before the masses in order to bring about a more determined and concrete struggle against the imperialist war and for the *defense of the Soviet Union.*"

"Infinitely more attention must be paid to development of the mass struggles for negro rights. Our main weakness here still remains the insufficient following out of the policy of unfolding daily struggles against negro discrimination and oppression, especially against lynchings, and the drawing of white workers together with the negroes into the fight. And in close connection with this decisive activity we must broadly unfold the full negro program of the Party exposing the social fascists (Thomas' opposition to self-determination and his threat of 'race riots') and the negro reformists.

[fol. 169] Document No. 15: A book of 247 pages, entitled: "Communism and Christianism", "Analyzed and contrasted from the Marxian and Darwinian points of view." By Rt. Rev. William Montgomery Brown, D.D., Episcopus in partibus Bolshevikium et Infidelium.

(See extracts from this book, 3 pages forward.)

Document No. 16: A four-page leaflet entitled: "An Appeal to Southern Young Workers," part of which is as follows:

"The Young Communist League is the champion not only of the young white workers but especially of the doubly

oppressed negro young workers. The Young Communist League fights against the whole system of race discrimination and stands for full racial, political, economic and social equality of all workers.

"The chief aim of the Young Communist League is to organize the young workers for a struggle against the bosses and against the whole profit system.

"The Young Communist League is a section of the Young Communist International, the revolutionary leader of the young workers the world over and accepts the guidance of the Communist Party of America.

"The Young Communist League fights for:

1. At least $20.00 weekly wage for all young workers.
2. A six hour day for all young workers under 18.
3. 4 weeks' vacation with pay for all young workers.
4. Two 15 minute rest period every day. Against the speed-up system.
5. No child labor under 14. The State to support all those now employed under that age.
6. Equal pay for equal work.
7. Full political, social and racial equality for the negro workers.
8. Against bosses' wars! Defend the Soviet Union!
9. Smash the National Guard, the C. M. T. C. and R. O. T. C.

[fol. 170] 10. For the right of all workers to defend themselves, their union, their right to organize, free speech.

11. Freedom of the Gastonia prisoners and all other class prisoners.

12. For A workers and farmers Government in the United States.

Young Workers! Join the Young Communist League"

Document No. 17: A 64-page booklet entitled: "Party Organizer", Special Plenum issue, May-June, 1932. Issue by Central Committee, Communist Party, U. S. A., containing a number of articles on the Communist Party and what it advocates, and particularly how to organize workers into "cadres."

Document No. 18: A book of 126 pages entitled: "The Life and Struggles of Negro Toilers," by George Padmore.

Published by the R. I. L. U. Magazine for the International Trade Union Committee of Negro Workers.

Following are the contents of this book, by chapters:

Chapter I. Oppression of Negro Toilers (Africa).
Chapter II. Black Slaves in the New World.
Chapter III. Under the Yoke of Yankee Imperialism.
Chapter IV. The Awakening of Negro Toilers.
Chapter V. Black Soldiers of Imperialism.
Chapter VI. Revolutionary Perspectives.

(Extracts from Chapter II, (page 46) are as follows:)

"Therefore, unlike their black brother in Africa, the Negroes of the New World have had centuries of contact with the white capitalist civilization. But like the negroes in Africa, they are subjected to the same barbarous methods of imperialist plunder and exploitation. • • • In no [fol. 171] other so-called civilized country in the world are human beings treated as badly as these 15 million negroes. They live under a perpetual regime of white terror, which expresses itself in lynchings, peonage, racial segregation and other pronounced forms of white chauvinism. • • • They are absolutely at the mercy of every fiendish mob incited by the white landlords and capitalists. Bands of business and professional men make periodical raids upon the black countryside, where they lynch negroes, burn homes and destroy the crops and other property belonging to the blacks. In most cases of lynching the negroes are burned to death after their bodies have been soaked in gasoline, while others are hanged from trees. On these occasions the entire white community turned out to witness the bloody spectacles, which were made 'Roman Holidays'."

On page 48 of this book it is charged that white people "invade the sections where the negroes live, burn homes and crops, kill off live stock, poison drinking wells, murder and lynch unarmed men, women and children who dare to offer resistance to their programs."

(Following are some quotations from the book, "Communism and Christianism", which is listed, supra, as Document No. 15:)

"Banish the Gods from the Skies and Capitalists from the Earth and make the World safe for Industrial Communism."

"As the machinery of capitalist government, including the armed forces of the nation, conserves the monopoly by the capitalist class of the wealth taken from the workers, the working class must organize consciously and politically for acquiring the powers of government, national and local, in order that this machinery, including these forces, may be converted from an instrument of oppression into the agent of emancipation and the overthrow of privilege, aristocratic and plutocratic.

[fol. 172] "The trouble with every reformatory socialism of modern times is that it understakes the impossibility of changing the fruit of the capitalist state into that of the communistic one, without changing the political organism; but to do that is as impossible as to gather grapes from thorns or figs from thistles. Hence an uprooting and replanting are necessary (a revolution not a reformation) which will give the world a new tree of state.

"Capitalism no longer grows the fruits (foods, clothes and houses) which are necessary to the sustenance of all the world. Hence it must be dug up by the roots in order that a tree which is so organized that it will bear these necessities for the whole world may be planted in its place.

"The people of Russia have accomplished this uprooting and replanting (this revolution) in the case of their state, and those of every nation are destined to do the same in one way or another, each according to its historical and economic development, some with much violence, most, I hope, with but little."

Document No. 19: A sixty-page book of receipts for money for the Communist Election Campaign Fund, the following being a sample page:

(Here follows photolithograph of page of receipt book, side folio 173.)

BROUGHT FORWARD

No. 2286

$100,000.00 Communist Election Campaign Fund
P. O. Box 87, Station D, New York, N. Y.

District Section Org. Press City State

Received from

Address

1932 Received by

No. 2287

$100,000.00 Communist Election Campaign Fund
P. O. Box 87, Station D, New York, N. Y.

District Section Org. Press City State

Received from

Address

1932 Received by

No. 2288

$100,000.00 Communist Election Campaign Fund
P. O. Box 87, Station D, New York, N. Y.

District Section Org. Press City State

Received from

Address

1932 Received by

No. 2289

$100,000.00 Communist Election Campaign Fund
P. O. Box 87, Station D, New York, N. Y.

District Section Org. Press City State

Received from

Address

1932 Received by

No. 2290

$100,000.00 Communist Election Campaign Fund
P. O. Box 87, Station D, New York, N. Y.

District Section Org. Press City State

Received from

Address

1932 Received by

CARRIED FORWARD

[fol. 174] Document No. 20: A sheet of "minutes" (typewritten) as follows:

"Minutes of the Section Committee

July 10, 1932.

"Members present, 4; Absent, 2.

Comrade H, reported in detail on the DB meeting. Main points of BD meeting August 1st, Birmingham, etc. For Atlanta nothing definite laid out for this section, only proposals of work was agreed on by the DB. In organizing our unemployed groups we can get a lot of experience from the way the comrades there are doing in organizing their unemployed groups (Capitans and sub Capitans in the different wards, Capitans have meeting weekly together map out plan of work for the whole ward). On August first, it will depend upon our success to break thru on the issue of demanding unemployment relief, etc. Comrades F, L, and others to go to Mayor and ask for permit for vacant place for the unemployed to meet and discuss their problems. This unemployed meeting will be a perliminary for August first. Organize special day for distribution of the 750 copies of the Daily's that we will get for our section. All CP Members to be on the duty at the August first meeting and the unemployed meetings too. They are to get as many contacts as they can with unemployed workers to start groups in their neighborhoods, and the results shouldn't be like it was at our demonstration. Comrades H, and H, K, and Houseworth to meet with ILD, take up policy of work with them of developing local struggles to popularize the Scottsboro case more effectifully among the White workers and the negro workers as well, to visit all Churches possible to raise funds for the defense. By pointing out to the White workers, that they are being framed up as well as the negro and on these basis we will be able to get more white workers to support the Scottsboro campaign. Also two white comrades must be assigned to the ILD group and attend meetings regular. Comrade F, will be unit org. of unit 12, H, to attend unit 12, meeting, Hern, to meet unit 11."

[fol. 175] Docket No. 21: A note-book containing penciled "minutes" and notes as follows:

"The Ford & Foster Club met on Friday night July 1, and Miss King was the first speaker.

2 and carmade Hall next he read a pece in the Atlanta Georgian that they was 6,000 dollars raze for the unployed releaf after the Demestrahun at the Cort house on thirday morning.

3 three join at the last meeting and it was moved in second the each carmade will pay 5¢ dues a week

4 and it was all so moved in second that carmade Russell will be our treager

5 it was all so moved in second that carmade Walker Carmade Lula turner Carmade Josiephine Bullock on the Orzashoion committie

6 then the meeting rejurn.

"Ford and Foster Club, Friday night meeting July 10

The election of delagate to the state convanism here in Atlanta Ga Carmade King spoke on the relaf for the workers She all so spoke on the demand that all the prison that are on the changan shall be relested and it was moved in second.

Mr. Whitaker, head of Community chest!

All so Carmade Hall left it up to us to demand for that 6,000 dollars that has ben razed for the unployd

It was discushed betwen all the Comrade that the demand for the release of 6,000 in cash money

It was all so moved in second that we all so demand a turn ½ of cold to each famley for this wenter

Carmade Walker reported that he was to orzinize to clubs one on east side and one on the north side

It was all so moved in second that the school chirldren will get cloth and car fair from the city realf

Next Carmade Montgomery Carmade Edd Grove Carmade Russell Carmade Walker are the Delagate to the State convanison here in Atlanta Ga. three new members

[fol. 176] Document No. 22: Postoffice box rent receipt, as follows:

"No. 1039" Post Office, Atlanta, Ga.
Sept. 29, 1931

M James Dix.

To Rent of Box No. 339 for Quarter Ending Dec. 31, 1931, $2.00.

Received payment, Edw. K. Large, Postmaster.
J. M. C.

Document No. 23: Postoffice box rent receipt, as follows:

"No. 798. Post Office, Atlanta, Georgia.
Dec. 30, 1931.

Mr. James Dix.

To Rent of Box No. 339 for Quarter Ending Mar. 31, 1932, $2.00.

Received payment, Edw. K. Large, P. M. J. M. C.

Document No. 24: Postoffice box rent receipt, as follows:

"No. 1201. Post Office, Atlanta, Georgia,
Mar, 31, 1932.

M James Dix.

To Rent of Box No. 339 for Quarter Ending June 30, 1932, $2.00.

Received payment, Edw. K. Large, P. M. J. M. C.

Document No. 25: Postoffice box rent receipt, as follows:

"No. 155. Post Office, Atlanta, Georgia.
Jul. 5, 1932.

M James Dix.

To Rent of Box No. 339 for Quarter ending Sept. 30, 1932, $2.00.

[fol. 177] Received payment, Edw. K. Large, P. M., J. M. C.

Document No. 26. Typewritten "minutes" as follows:

"Minutes of the Foster & Ford Clubs

July 8, 1932

Club No. 3. The meeting started at 830 o'clock. Comrad King gave a detail report on the election campaign and the tasks the clubs should carry out in the election work. The floor was then open for the election of delegates to the state convention to be held in Atlanta pretty soon, and the following comrades was elected: Comrad Montgomery, Comrade Russell, Comrade Walker, Comrade Grove. The delegates are to be notified a couple of days ahead of time for the convention. Comrade King also went in detail on the question of the demands that we should be willing to fight for, the demands are as follows:

For the release of all workers arrested and framed up on vagrancy and that this vagrancy law be did away with completely. (2) That each unemployed workers should get $4.00 a week no matter how small their family but in the case of a larger family the amount should be enough to provide for all of them if there are 12 in a family they should get $12.00 a week and so on: . (3) There should not be any form of discrimination in the distribution of this relief, against negro workers mainly, and other workers who do not have familys etc. (4) Half of this amount to be in the form of cash money and the other half will be in scrip, for instance if one family get six dollars, half of this should be cash and the other scrip. (5) That City and the County begin to get ready now to provide 1 ton and a half for all unemployed workers for this winter starting with September first and ending the latter part of April. (6) That the City and County officials and their government provide free shoe clothing, and car fare for the childrens of the unemployed workers of Atlanta. Comrade Walker reported that he was going to organize clubs on the east side and the North side and other places where he no workers. The meeting adjourned at 10 o'clock.

[fol. 178] "Comrade K, to write center on the question of the composition of the Candidates in the election since there has been some confusion on this question. Also to prepare draft leaflet for state convention. All election clubs to elect delegates at their next meetings to the city central committee of the election campaign. Comrade Housew, to take care of the ILD meeting Tuesday, and take up special points with them.

Section Committee of Atlanta, Georgia, Box 339, Post Office.

Document No. 27. Plain envelope addressed: "Angelo Hérndon, Box 339, City" containing two red cards: Application for Membership in Communist Party of the U. S. A., as follows:

(Here follows photolithograph of Application for Membership, side folio 178-A.)

COMMUNIST PARTY of the U. S. A.

Application for Membership

The undersigned declares his adherence to the program and statutes of the Communist International and the Communist Party of the U. S. A. and agrees to submit to the discipline of the Party and to engage actively in its work.

.....
(Signature of applicant)

Proposed by (1).....

(2).....

NOTE: An application fee of 50 cents (for unemployed 10c) must accompany the card. The space below to be filled out by the Nucleus Secretary.

Date proposed .....Date Accepted .....

District..... City .... Sec. .....Unit .....

M .....
(Signature of Nucleus Secretary)

Assigned to .....

See other side.

178-A

[fol. 179] Document No. 28: Copy of the "Daily Worker", a newspaper, labelled "Central Organ of the Communist Party, U. S. A.", issue of July 8, 1932, containing various news articles and editorials, among them being an article issued by "Central Committee, C. P. U. S. A." saying in part as follows:

"The Communist Party fights for peace, fights against imperialist war, fights for the defense of the only workers' republic in the world—The Soviet Union. • • •

"The Communist Party is the only party which fights for equal rights for the negro people. It is the only party which fights for the right of the negro people to govern in the 'Black Belt'." • • •

"Every penny you contribute will aid the Communist Party and the Daily Worker bring the program of the revolutionary workingclass to every nook and corner of the United States."

The title lines of this newspaper, with the six planks of the Communist Party published at the top of the page, are as follows:

(Here follow photolithographs of side folios 180, 181 and 182)

Daily Worker
Central Organ of the Communist Party U.S.A.
(Section of the Communist International)

VOTE COMMUNIST FOR

1. Unemployment and Social Insurance at the expense of the state and employers.
2. Against Hoover's wage-cutting policy.
3. Emergency relief for the poor farmers without restrictions by the government and banks; exemption of poor farmers from taxes, and no forced collection of rents or debts.

VOTE COMMUNIST FOR

4. Equal rights for the Negroes and self-determination for the Black Belt.
5. Against capitalist terror; against all forms of suppression of the political rights of workers.
6. Against imperialist war; for the defense of the Chinese people and of the Soviet Union.

"Everything Is Peaches Down in Georgia"

By OTTO HALL

THE "Tin Pan Alley" song writer, who wrote this song, should look at Georgia today. He would certainly find that things are a long way from being "peaches" down there now, and that they never were—for the majority of the toiling population of this state, Negro or white. The gentleman who wrote this song is typical of the "inspired" capitalist song writers of the day. He probably has been about as far South as the "Battery," and is therefore well qualified to write these songs that glorify capitalist America.

If the workers and poor farmers in the North are, in this third year of the crisis, suffering and have had their living standards reduced to the starvation level, the condition of the toilers in this section is one hundred fold worse. Particularly is this true in the state of Georgia. Negro and white tenant farmers, unable to live any longer on the farms, are picking up their few belongings (if they happen to have any) and flocking to the cities, thus adding to the ever-growing number of unemployed in the urban centers. The so-called independent small farm owners are having their farms taken away from them by the mortgage bankers for back debts, and by the state for inability to keep up their taxes.

The Hoover Farm Board has given these farmers some left-handed help by buying thousands of sacks of flour and shipping it to the big plantation owners and mortgage bankers in the towns, who pay the freight on this flour and

The Song and the Facts

store it in their groceries and sell it at high prices to the poor farmers and Negro share-croppers in spite of the fact that each sack is plainly marked "not to be sold." There are hundreds of abandoned farms in this state, where the farmers have been forced to leave and their farms taken over by the bankers and the state.

More Negroes Forced Into Peonage.

As for the Negroes, who greatly outnumber the whites in the rural sections, there are scarcely a handful of farm owners left. Overseers are now standing over the Negro share-croppers and tenant farmers with guns, driving them to work like convicts. These workers are finding it impossible to escape this slavery, and whenever the runaways are picked up in the cities they are promptly shipped back by trains. In Monroe County, some Negro farmers were sent government loan checks through the banks, amounting to several thousands of dollars. These checks were brazenly confiscated by the bankers and rich farmers of that territory, and the Negroes were terrorized into allowing themselves to be robbed of this money. Many of the Negro families, who have escaped this slavery, have stated openly that they will die before they will allow themselves to be sent back.

White Workers Forced to New Low Level.

One of the most noticeable effects of the crisis in this section is that the standard of living of a great majority of the whites has already reached a level as low as that of the Negroes. It is a common expression down here, that a white man can be hired cheaper that what it used to cost to hire a Negro. Whites are glad to get jobs now that used to be considered exclusively "nigger jobs."

This situation, which is of the greatest importance in the development of the revolutionary movement today and is speeding the unity of Negro and white workers, means that capitalism is no longer able to maintain the material basis for the ideology of white superiority among ever larger sections of the white working class. White workers, in these parts, are beginning to realize that the capitalist bunk about "Anglo- Saxon superiority," merely gives them the privilege (?) of starving separately from the Negroes.

Atlanta Cuts Off Relief.

The immediate need of working-class unity has lately been plainly before the workers of Atlanta and the rest of the state in its sharpest form. The entire capitalist press of this section has been carrying on an intensive hoax to the farm agitation. In spite of the fact that numerous workers, Negro and white, have been forced to leave their farms because of inability to live on them any longer, editorial after editorial has appeared in the press hauling the back to the farm movement.

The real purpose behind all this agitation was brazenly exposed at a meeting of the County Commission, together with a group of charity fakers. According to the local press, this meeting was called for the purpose of taking up an emergency situation that had arisen in Atlanta due to the recent closing of the relief stations which affected twenty-two thousand workers. These workers, who constitute about one-fourth of the totally unemployed in Atlanta, were receiving a miserable pittance through the Community Chest fund. When this relief closed down, it doomed these workers to quick starvation with the rest of the unemployed. In spite of the fact that only a few months ago the Community Chest fakers collected over eight hundred thousand dollars from the workers of this city, they now claim to be without funds and unable to continue the miserable relief they have been giving.

They came to the meeting of the County Commissioners with proposals to add to the already heavy tax burden of the poor workers and home owners in order to maintain their high-salaried jobs.

Mr. Frank Neely, executive director of the local Community Chest and a sixty-five hundred dollar a year faker, shed crocodile tears over the plight of all the starving workers and said that though he was hard-boiled, his heart bled for those poor families that came to his office for relief."

Urge Back to Ruined Farms Plan.

But it remained for Mr. Walter S. McNeal, Jr., a big banker and real estate man of Atlanta, to make the proposal that was hailed by the press and the County Commissioners as the most concrete proposal of the evening. He pointed out that there are hundreds of

DOCUMENT #29.

1928

farms in the state that had been fights over for home and were now lying idle. He stated that the city and county authorities should round up all the "idle" in the city, together with their families, and ship them out to these farms and make them work for their board. He optimistic remarked that, "a little silver grease won't hurt them." Commissioner Hendrix stated at the meeting that he did not believe that there were any starving people in Atlanta, and if there were any he had not seen them.

The local unemployed committee, although a small committee consisting of about a dozen members, immediately issued ten thousand leaflets, exposing the fakery of the Community Chest and the slavery schemes of the local politicians, calling on the workers, Negro and white, to demonstrate at the County Court House Thursday morning at 10 o'clock. The leaflets called on the workers to bring their families to the office of Commissioner Hendrix in the County building and show him that there are starving people in the city of Atlanta, and to demand the reopening of the relief stations and immediate relief.

1,000 Demand Immediate Relief.

On Thursday morning, June 30, the workers of Atlanta showed the bosses that they would not tolerate any forced labor program and that they would fight against starvation. About a thousand working men, women and children, Negroes and white, almost equal in numbers, went down to the court house, walked up to the Commissioner's office on the fourth floor and demanded relief. This was the first time any demonstration of workers had ever occurred in the city of Atlanta. Although the police were there in numbers, they did not dare interfere with them. The police of this section are noted for their brutal treatment of Negro workers; but this time they were unusually polite. When one copper told a Negro worker in the corridor that they were going to send them all back to the farm and make them earn their keep, this worker answered him by telling him that he knew two people who wouldn't go. The cop asked him, who were those. This worker said: "It will be me and you if you come after me." The cop backed away and said that he was only fooling.

Bosses Attack Unity of Negro and White.

The authorities were particularly concerned over the show of solidarity among the Negro and white workers. They were able to break this due to our weak organization among the whites. None of the white comrades whom we had assigned to take charge of the white workers showed up thus leaving these workers without any leadership. So that when the fakers called the white workers into the County Commissioner's Office, they shut the door on the Negro workers, and there was nobody among the white workers to protest this. The Negroes tried to get into the office, but were blocked by the police. It is obvious that had any white worker raised his voice in protest against this maneuver the rest of the workers would have followed him and we would have defeated it at the outset. Because, up to that time, all the workers, Negro and white, were mingling together. Agitation will be carried on in the future among the white workers, exposing the bosses' method of breaking up the solidarity of Negro and white.

The fakers talked to the white workers about an hour, behind closed doors, telling them that the county had no money and advising them that if they had any relatives on the farms to go back there. These workers were very much dissatisfied over this conference, and went away mumbling that they were in the same position that they were before. But, as a direct result of this demonstration, the County Commissioners held a meeting the next morning and decided to vote six thousand dollars for immediate relief for the unemployed. Even the capitalist press admitted that it was due to our demonstration that the authorities took this step.

Must Push Fight for Negro Rights

The local Unemployed Committee, has received considerable prestige among the workers of this section as the result of this partial victory, and is following this up with organization meetings and further demonstrations before the city and county authorities. Particularly are they alive to the dangerous situation that is being created by the desperate efforts of the bosses to prevent the growing unity of the Negro and white workers. There must be a wide educational campaign carried on among the white workers exposing the separation schemes of the bosses, and the comrades here, must note they have in the past, depend upon the spontaneous development of Negro and white unity. The struggle for Negro rights must be in the forefront of all our struggles, and the fight for the right of the Negroes to determine their own for self government, particularly in this big section of the "black belt, must be pushed more determinedly.

Finally the intensification of our unemployed campaign connected up with the election campaign issue gives us the possibility to break through this terror that has been in existence particularly since the trial of the "Atlanta Six." With continued work, we can look forward to the time when everything will REALLY be "peaches" down in Georgia.

Document No. 29: Copy of the "Daily Worker," issue of July 8, 1932, being another issue of the same newspaper set forth in preceding document. This issue has the same title line, with the six planks of the Communist Party listed at the top of the first page, the same as quoted in Exhibit 28.

The following article appears on the 6th (editorial) page of this issue:

[fol. 183] Document No. 30; being a circular letter as follows:

Workers of Atlanta

Employed and unemployed Negro and White

Attention!

Men and Women of Atlanta:

Thousands of us, together with our families, are at this minute facing starvation and misery and are about to be thrown out of our houses because the miserable charity handout that some of us were getting, has been stopped! Hundreds of thousands of dollars has been collected from the workers in this City for relief for the unemployed, and most of it has been squandered in high salaries for the heads of these relief agencies.

Mr. T. K. Glenn, president of the Community Chest is reported to be getting a salary of 10,000 dollars a year. Mr. Frank Neely, executive director of the Community Chest, told the County Commission Saturday that he gets 6,400 dollars a year while at the same time no worker, no matter how big his family, gets no more than two dollars and a half weekly to live on. If we count the salaries paid the secretaries and the investigators working in the 38 relief stations in this City, it should not surprise us that the money for relief was used up and there is no more left to keep us from starvation. If we allow ourselves to starve will these fakers grow fat off our misery, it will be our own fault!

The bosses want us to starve peacefully and by this method save the money they have accumulated off of our sweat and blood. We must force them to continue our relief and give more help. We must not allow them to stall us any longer with fake promises. The City and County

authorities from the money they have already collected from us in taxes, and by taxing the incomes of the bankers and other rich capitalists, can take care of every unemployed family in Atlanta. We must make them do it.

At a meeting of the County Commissioners last Saturday, it was proposed by Walter S. McNeal, Jr., to have the police round up all unemployed workers and their families [fol. 184] and ship them to the farms and make them work for just board and no wages, while just a few months ago these hypocrites were talking about forced labor in Soviet Russia, a country where there is no starvation and where the workers rule! Are we going to let them force us into slavery?

At this meeting Mr. Hendrix said that there were no starving families in Atlanta, that if there is he has not seen any. Let's all of us, white and negroes together, with our women folk and children go to his office in the county court house on Pryor and Hunter Sts. Thursday morning at 10 o'clock and show this faker that there is plenty of suffering in the city of Atlanta and demand that he gives us immediate relief! Organize and fight for unemployment insurance at the expense of the Government and the bosses! Demand immediate payment of the payment of the bonus to the ex-service men. Don't forget Thursday morning at the County Courthouse.

Issued by the Unemployed Committee of Atlanta.
P. O. Box 339.

Document No. 31, being a circular as follows:

Our Demonstration got us $6,000.00 from the County

Workers of Atlanta!

Employed and unemployed! Negro and White

The County Commissioners voted $6,000 to continue our relief, because Thursday, hundreds of us, Negro and White, went to the Court House, showed the bosses there was plenty of starvation in Atlanta, and demanded relief. We crammed that lie down the throat of Commissioner Hendricks who said there were no starving families—but this gentleman was not present Thursday morning. *While we have gained something by showing the bosses we will not starve peacefully, this is not enough!* The County and City say they have no money. Where is the $600,000.00 that was

saved by cutting the salaries of the County officials? Why can't this money be given for relief? We can force these fakers to give us more relief if we organize and fight for it! [fol. 185] They are still talking about sending us to the farms to work for nothing the bosses will use any trick to keep us from getting the relief we are entitled to. Don't be fooled by this talk about good times on the farms: The farmers are starving and as ragged as we are!

Bosses Shocked by Unity of Negro and White

The biggest surprise handed the bosses who have been starving us out was when they saw Negro and White workers come down together to fight for relief. For many years they have handed us a lot of bunk about not having anything to do with the Negroes, and at the same time starving both of us. We white workers should not have allowed Commissioner Stewart and those other fakers to separate us from the negroes who came there with us. If we allow the bosses to divide us they will keep us both starving. We negro and white workers must stick together because that is the only way we can win. The bosses know this; that is why they work so hard to separate us. The privilege of starving separately don't mean anything to any sensible worker these days. The ex-servicemen in Washington know this, and Negro and White ex-servicemen are sticking together until they get their back pay—called the Bonus.

We Must Organize

Every day the bosses and landlords cut off our water and throw us out on the streets, both Negro and White. They don't care how many of us starve, white or black. We won't starve if we organize! The unemployed committee calls on the workers of every neighborhood to get together, organize your committees and see that no worker is evicted because he can't pay the rent. We must see that every relief station stays open and all of us and our kids are fed! There is no reason for any worker to starve in the midst of plenty! The unemployed Committee will call a meeting in the near future of all workers, negro and white, to get together and make up our program of demands that we will organize and fight for.

Watch for our next circular!

[fol. 186] We refuse to starve.
For information, write to
C. Jones, Chairman, Box 339, Atlanta, Ga. Unemployed Committee of Atlanta.

IN SUPERIOR COURT OF FULTON COUNTY

ORDER APPROVING BRIEF OF EVIDENCE

The foregoing is hereby approved as a correct Brief of Evidence in this case The State v. Angelo Herndon No. 37812. July 5, 1933.

L. B. Wyatt, Judge S. C. Coweta Cit., presiding.

[File endorsement omitted.]

[fol. 187] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

CHARGE OF THE COURT—Filed July 6, 1933

Gentlemen of the Jury:

The Grand Jury of this, Fulton County, on the 22nd day of July, 1932, returned a true bill of indictment against Angelo Herndon, in which they charge him with attempting to incite an insurrection.

The defendant, Angelo Herndon, upon arraignment files his plea of not guilty and that forms the issue that you are to try in this case.

Now, gentlemen, I charge you that the bill of indictment is not evidence and should not be considered by the Jury as such; the sole purpose of the bill of indictment is to bring the charge against the accused, and then his denial of that charge, by filing a plea of not guilty, forms the issue that you are to try in the case.

Now, gentlemen I charge you that the defendant enters upon the trial of his case with the legal presumption of innocence in his favor, and that presumption goes with him throughout the trial as his shield and protection until

the State has proven him guilty beyond a reasonable doubt. It is, therefore, encumbent upon the State to prove to the satisfaction of your minds beyond a reasonable doubt the material allegations contained in this bill of indictment before there could be a conviction. Now, Gentlemen, the material allegations that it is thus encumbent upon the State to prove to the satisfaction of your minds beyond a reasonable doubt are the following: That Angelo Herndon, on or about the 16th day of July in the year 1932, in Fulton County, Georgia, did make an attempt to incite insurrection and did make an attempt to induce others to join in combined resistance to the lawful authority of the State of [fol. 188] Georgia, with intent to the denial of the lawful authority of the State of Georgia and with intent to defeat and to overthrow the lawful authority of the State of Georgia by open force and by violent means and by unlawful acts, said attempt to incite insurrection intended to be manifested by accused by unlawful acts and intended by accused to be accomplished by acts of violence, said attempt to incite insurrection being made by accused in the following manner to wit:

(1) Accused did call and did attend public assemblies and mass meetings in the homes of various persons whose names and addresses are to the Grand Jurors unknown, and did make speeches to various persons to the Grand Jurors unknown, the purpose of said meetings and the purpose of said speeches being to organize, to establish and to set up a group and combination of persons, white and colored, under the name and style of The Communist Party of America for the purpose of uniting, combining and conspiring to incite riots, to embarrass and impede the orderly processes of the courts and for the purpose of offering and making combined opposition and resistance to the lawful authority of the State of Georgia, and for the purpose of overthrowing and defeating by force and violence the lawfully constituted authority of the State of Georgia, all of which said meetings were held in various places and on various occasions which are to the Grand Jurors unknown.

(2) Accused did by speech and by persuasion, solicit and did attempt to persuade and solicit certain persons whose names are to the Grand Jurors unknown to combine with, to join and to confederate with and to become members of

The Communist Party and The Young Communist League, and to become members, agents and parties to and of The Communist Party of America, to the intent and purpose of creating, offering, establishing and waging war against the lawfully constituted authority of the State of Georgia for the purpose of overthrowing the lawfully constituted au- [fol. 189] thority of the State of Georgia by acts of violence and by revolution and establishing in the place of said lawfully constituted authority of the State of Georgia a new government known as United Soviets Soviet Russia, sometimes called and known as "The Dictatorship of the Propertyless People."

(3) Accused did introduce and did circulate and did cause to be introduced and circulated and did aid and issist in introducing and circulating certain booklets, papers and other writings with the intent and purpose of inciting insurrection, riot, conspiracy, uprisings against the constituted authority of the State and for the purpose of establishing combined resistance to and against the lawful authority of the State of Georgia, the names and contents of said books, papers, and writings in part are as follows hereinafter, their full contents being of such a nature as that they cannot be copied in full in this indictment:

Book A. "The Life and Struggle of Negro Toilers", by Geo. Padmore. Page 46:

Therefore, unlike their black brother in Africa, the negroes in the New World have had centuries of contact with the white capitalist civilization. But like the negroes in Africa they are subjected to the same barbarous methods of imperialist plunder and exploitations. * * * In no other so-called civilized country in the world are human being treated as badly as these fifteen million negroes. They live under a perpetual regime of white terror, which expresses itself in lynchings, peonage, racial segregation and other pronounced forms of white chauvinism, * * * They are absolutely at the mercy of every fiendish mob incited by the white landlords and capitalists. Bands of business and professional men make periodical raids upon the black countryside, where they lynch negroes burn homes and destroy the crops and other property belonging to the blacks. In most cases of lynching the negroes are burned to death after their bodies have been soaked in gasoline, while

[fol. 190] others are hanged from trees. On these occasions the entire white community turned out to witness the bloody spectacles, which were made "Roman Holidays."

And many other passages of similar import as on page 48 of said book, White people are accused of burning the homes, destroying crops, killing live stock, poisoning drinking water wells, murdering and lynching unarmed men, women and children.

Book B. "Party Organizer", Special Plenum Issue, Vol. V., May-June, 1932, No. 5 and 6, Issued by Central Committee Communist Party U. S. S. Same being a book of instructions to organizers of the Communist Party and containing the details of methods of approaching factories, cotton mills, industrial plants and shops and containing instructions, doctrines, and teachings as to the methods of preparing and organizing strikes in the various shops, industrial plants, cotton mills and other places where people work, containing information as to methods of training and developing and organizing workers and leaders in the Communist Party and in building up and bringing on strikes, riots and revolutions.

Book C. "Communism and Christianism", by Wm. Montgomery Brown, "Banish the Gods from the skies and Capitalists from the earth and make the world safe from industrial communism", in part as follows:

Page 6: "As the machinery of capitalist government, including the armed forces of the nation, conserves the monopoly by the capitalist class of the wealth taken from the workers, the working class must organize consciously and politically for acquiring the powers of government, national and local, in order that this machinery, including these forces may be converted from an instrument of oppression into the agent of emancipation and the overthrow of privilege, aristocratic and plutocratic."

[fol. 191] On pages 98 and 99 of said book:

"That trouble with every reformatory socialism of modern times is, that it undertakes the impossibility of changing the fruit of the capitalistic state into that of the Communistic one, without changing the political organism; but to do that is as impossible as to gather grapes from thorns

or figs from thistles. Hence an uprooting and replanting are necessary (a revolution not a reformation) which will give the world a new tree of state.

"Capitalism no longer grows the fruits (foods, clothes and houses) which are necessary to the sustenance of all the world. Hence it must be dug up by the roots in order that a tree which is so organized that it will bear these necessities for the whole world may be planted in its place."

Certain newspapers call- The Daily Worker and The Southern Worker, being the official organ of the Communist Party and containing various articles criticising the courts of the United States and the various States and designed and intended to scatter and carry and implant in the minds of the people and the citizens of Georgia hatred and contempt against all constituted authority of the State with intent to the overthrow, denial and defeat of the lawfully constituted authorities of the State.

And all of the acts of the accused being done by accused with intent to formulate and to establish and to set on foot and to make effective combined resistance by force and violence to the lawful authority of the State of Georgia and to cause, produce and bring to pass the defeat, denial, and overthrow by acts of violence, by unlawful means and by revolution, the lawfully constituted authority of the State of Georgia as above set forth and all of the acts of the accused were are are contrary to the laws of said State, the good order, peace and dignity thereof.

Now, gentlemen of the Jury, if the State has proven these material allegations as set out in this bill of indictment, the defendant would be guilty of the offense of attempting to [fol. 192] incite an insurrection, and it would be your duty to so say by your verdict. However, if the State has failed to prove these material allegations, or if you have a reasonable doubt about the State having proven either of these material allegations, the law says the defendant is entitled to the benefit of that doubt and should be acquitted.

Now, gentlemen, you will note that the charge as contained in this bill of indictment is attempting to incite insurrection. The defendant is not charged in this bill of indictment with inciting insurrection, but he is charged with the offense known under the law of this State as attempting to incite insurrection; so it will be necessary for me to give you the definition of insurrection. The law says this: "In-

surrection shall consist in any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested, or intended to be manifested by acts of violence."

That, gentlemen, is what inciting insurrection means. Now, gentlemen, the law goes further and denominates as an offense, an attempt to incite insurrection. The law says that any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection. I will read that section to you again, gentlemen, because it is the provision of the law in which this particular indictment is involved, and it is important that you get in your minds the meaning of the section; again reading, as follows: "Any attempt by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection." And, gentlemen, the law further says any person convicted of the offense of insurrection, or an attempt to incite insurrection—which is the charge in this indictment—shall be punished with death; or, if the jury recommend to mercy, confinement in the penitentiary for not less than five nor more than twenty years.

[fol. 193] Now, gentlemen, I charge you that the State must carry the burden of proving all of the material allegations of the indictment, as I have heretofore instructed you, including proof of intention to use or employ some act or acts of violence in the furtherance of said alleged attempt to incite insurrection. If any has been shown by the evidence in this case, this rule of law applies to the charge of attempting to incite insurrection in the same manner as it will apply to actually inciting insurrection. In other words, gentlemen, the State must show and show beyond a reasonable doubt that the accused did the acts charged against him in the bill of indictment, and that there must have been in the mind of the accused at the time an intention to overthrow and deny the authority of the State, and that such intention must have been manifested by the accused, or intended by him to be manifested by acts of violence; that is, by some act or acts prohibited by law.

Now, gentlemen, on the question of what was the intention of the accused at the time of the alleged acts set forth in this indictment, if any such acts have been shown by the

evidence in this case, you look to all the evidence and the defendant's statement and determine from those sources what was his intention at the time such acts were committed, if you believe from the evidence in this case any such acts were committed.

I charge you, gentlemen of the Jury, that mere possession of literature insurrectionary in its nature on the part of the accused wouldn't warrant a conviction in this case, nor would engaging in academic or philosophic discussions of abstract principles of economics or politics or other subjects however radical or revolutionary in their nature. There must be an attempt by persuasion, by speech or by some other means to induce others to join in combined resistance to the lawful authority of the State with intent to the denial thereof, and the evidence must show that such intent was manifested, or intended to be manifested, by acts of violence. All of these things, gentlemen, must appear [fol: 194] from the evidence in the case and the defendant's statement, to the satisfaction of the jury and beyond a reasonable doubt before you would be authorized to convict the defendant.

Now, gentlemen of the Jury, as before stated, the charge named in this indictment is an attempt to commit a crime, that is, an attempt to incite insurrection, and inciting an insurrection being a crime why, attempting to incite an insurrection, as I have heretofore charged you would be a crime. The law says if any person shall attempt to commit a crime but shall fail in the perpetration thereof or be prevented or intercepted before consummating the same, he may be found guilty of the offense of attempting to commit a crime.

An attempt to commit a crime, gentlemen, is an act done with intent to commit that crime and tending to, but falling short of its commission, and has two essential elements; first, the act must be such as would be approximately connected with the completed crime; and, second, there must be an apparent probability to commit the crime in the manner proposed. There must be an act done in pursuance of the intent directly tending to the commission of the crime. In general, the act must be unexplainable, that is, unexplainable as a lawful act, and must be more than mere preparation. It must be such an act as approximately leads to the consummation of the crime. The mere preparation for

the commission of the crime but not proximately leading to its consummation do not constitute an attempt to commit the crime, the accused must do some act towards its consummation. The mere acts of preparation will not suffice to establish an attempt to commit a crime. Between preparation and the attempt itself, there is a wide difference; the preparation constitutes the device or arranging the names and measures necessary for the commission of the offense. The attempt is the direct movement towards the commission after the preparations were made. The difference between preparation and the attempt is one of degree, and in decid- [fol. 195] ing this difference, you will take into consideration all the facts and all the circumstances as shown by the evidence and by the defendant's statement, in determining whether or not there was an attempt to commit the crime of inciting an insurrection.

Now, gentlemen, I charge you further, that advocacy means, according to Webster's Universal Business Dictionary the pleading in favor of or defending by argument before the public or a tribunal or court. Incitement, or to incite, which is charged in this bill of indictment means to move to action, stir up, to spur on, to urge on, as to incite a move to violence.

Now, gentlemen, I charge you that advocacy, however reprehensible morally, is not sufficient to convict the defendant where there is no evidence to indicate that the advocacy would be acted upon immediately. In order to convict the defendant, gentlemen, it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or was advocated.

I charge you, gentlemen, that an attempt to commit an act which is, in fact, a crime is not complete unless the alleged crime is dangerously near completion; that the mere possession of radical literature, as I have before stated, alone is not sufficient to constitute the crime of attempting to incite insurrection. That intent must be clearly and sharply distinguished from preparation, that attempt is the actual and overt arising of the act, or the beginning of a series of acts, which themselves when completed, will constitute a crime. Preparation is merely the organizing of forces and resources to be used later and does not signify overt hostile act. So that, gentlemen, you will observe the difference between advocacy, the difference between prepa-

ration and the difference between an attempt as I have attempt- to define these three things to you in order to constitute the offense of an attempt, it is necessary that the party charged, the defendant in this case, should do some [fol. 196] act to cause others to become associated with him and act in a combined way for the purpose of overthrowing or denying the constituted authority of this State—the overthrowing of this government or denying the constituted authority of this State by a combined effort.

Now, gentlemen, I charge you in this case, that there is no confession and this is admitted by Counsel on both sides—that is known under the law as a confession—but that under the evidence in this case, it will be a question for you to determine whether or not there were incriminatory statements made. The difference between a confession and an incriminatory statement is that the confession must relate to the whole crime in order to be a confession and must confess to every act that it takes to constitute the crime. A man can make incriminatory statements which admit some fact that would be necessary to constitute the crime, some element that would be necessary to constitute the crime under the rules of law I have given you in charge in this case. So you will determine, gentlemen, whether or not the defendant in this case made any incriminatory statements, that is, admitted any facts in connection with the commission of the crime, if any crime was committed, that would be a part of the total element that it would take to make up the crime as a whole, and you are to be the judges of whether or not such fact is true.

You are sole judges of all the facts and the Court can express no opinion, and does express no opinion as to what has or what has not been proven, it is for you to determine whether or not any of these things that I have charged you upon have been proven. If incriminatory facts have been proven, if it has been proven that this defendant made incriminatory statements under the rule I have just given you in charge, why, you may consider that along with the other evidence in determining whether the defendant is guilty or innocent.

[fol. 197] Now, gentlemen, I charge you further that if you determine that there has been an incriminatory statement or statements made in this case, there is a rule of law that all incriminatory statements or admissions should be

scanned with care, and an incriminatory statement alone would not be sufficient to convict; there must be some other evidence outside of the incriminatory statement to connect the defendant with the perpetration of the crime, if any crime was committed.

Now, gentlemen, I charge you that the State in this case in part relies upon what is known as circumstantial evidence. The law with reference to circumstantial evidence is this: Direct evidence is that which immediately points to the question at issue. Indirect or circumstantial evidence is that which only tends to establish the issue by proof of various facts and circumstances sustaining by their consistency the hypothesis claimed.

And, gentlemen, to warrant a conviction on circumstantial evidence, the proven facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused.

Gentlemen, I charge you the law to be that, whether the evidence is dependent upon positive or circumstantial evidence the true question in criminal cases is, not whether it be possible that the conclusion at which the testimony points may be false, but whether there is sufficient testimony to satisfy the mind and conscience beyond a reasonable doubt. That is the true rule, Gentlemen, with reference to both direct and circumstantial evidence.

Now, gentlemen, you will take these rules of law that I have given you in charge and apply them to the facts in this case and determine what the truth of the matter is.

The object of all legal investigations is the discovery of the truth; so that you will take these rules of law I have given you in charge and apply them to the facts in this case [fol. 198] and determine what the real truth is. You understand, in this issue between the State and the defendant, the State claims this defendant is guilty of the offense of attempting to incite insurrection. Gentlemen, I have given you in charge the rules of law on that subject. The defense, on the other hand, claims he is guilty of nothing—that he is not guilty of attempting to incite insurrection. The State has set out in the indictment the manner in which the State contends he did attempt to incite insurrection. The defendant, as I have said, comes along and says he is not guilty, that he did not attempt to incite insurrection, and that he is guilty of no offense at all. Well, that raise a clear-cut issue of fact for this jury to determine under

the evidence in the case and under the rules of law that I have given you in charge.

Now, gentlemen, if you convict the defendant, it will be your duty to fix the punishment. I charge you, gentlemen, that there are two punishments for this offense, the first is death by electrocution and the other is, upon recommendation of the jury, a term in the penitentiary of not less than five nor more than twenty years.

The defendant in this case, gentlemen, has made to you a statement in this defense, which he had a right to do, the law being in the trial of all criminal cases that the defendant has the right to make to the court and jury such statement as he may deem proper in his defense. The statement, gentlemen, is not under oath, and shall have only such force and effect as the jury shall see fit to give it. You may believe a portion of the statement and disbelieve a portion of it, you may be believe the entire statement, and you may believe the statement in preference to the sworn testimony in the case. The defendant's statement, as well — all evidence in the case, are questions of fact, and are to be determined by you—the weight you wish to give it, that is within your sole discretion.

[fol. 199] Now, gentlemen, as before stated, the punishment for the offense charged in this bill of indictment, one is death by electrocution, and the other is, upon recommendation of a jury, imprisonment in the penitentiary of not less than five years nor more than twenty years. So, that, gentlemen, if you convict the defendant in this case and think the extreme penalty of the law should be visited upon him, the form of your verdict would be: "We, the jury, find the defendant guilty." A verdict reading that way would mean that the defendant would be put to death by electrocution. If you convict the defendant and do not believe that the extreme penalty of the law should be imposed upon him, you have the right to recommend mercy. In that event, the form of your verdict would be: "We, the jury, find the defendant guilty and recommend him to mercy, and fix his punishment at not less than—(so many years) and not more than—(so many years)," and you may name both the minimum and the maximum at any number of years between five and twenty inclusive.

You understand, gentlemen, before the defendant could be convicted, his guilt should be made plainly and manifestly to appear beyond a reasonable doubt and to the ex-

clusion of every reasonable hypothesis, save that of the guilt of the accused.

If you find the defendant not guilty, you would say: "We, the jury, find the defendant not guilty."

Write your verdict, gentlemen, on this indictment, let it be dated and signed by your foreman and returned into Court.

The foregoing pages, numbered 1 to 14, represent a true and correct transcript of the charge of the Court, as delivered by the Court to the Jury on the trial of said case, and the same is hereby approved as such and ordered filed as a part of the record in said case.

This 24th day of June, 1933.

L. B. Wyatt, Judge, Superior Court Coweta Circuit, presiding.

[fol. 200] [File endorsement omitted.]

IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEFENDANT'S REQUESTS TO CHARGE

Now comes Angelo Herndon, defendant in above stated case, by his attorneys, John H. Geer and Benjamin J. Davis, Jr., and requests the court to charge the jury as follows:

That there is a difference between advocacy and incitement, and such must be borne in mind.

(1) That "advocacy" means according to Webster's Universal Business Dictionary: The pleading in favor of; the defending by argument before the public or a tribunal; to support, vindicate, or recommend publicly.

(2) That "incitement" or "incite" means to move to action; to stir up; to spur on or urge on; as to incite a mob to violence.

(3) That advocacy however reprehensible morally, is not sufficient to convict defendant where there is no evidence to indicate that the advocacy would be acted upon immediately.

(4) In order to convict the defendant it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or was advocated.

(5) That in order to convict the defendant it must appear according to the evidence that the incidence of insurrection is so imminent that it may befall the State of Georgia before there is opportunity for full discussion upon matters related to said speeches.

[fol. 201] (6) That defendant should be acquitted if the evidence does not show there was an emergency for his indictment for the attempt to incite insurrection to prevent insurrection.

(7) That an attempt to commit an act which is in fact a crime, is not completed unless the alleged crime is dangerously near completion; that the mere possession of radical literature, alone is not sufficient to constitute the crime of attempting to incite insurrection.

(8) That "attempt" must be clearly and sharply distinguished from "preparation"; that attempt is the actual and overt arousing of acts, or the beginning or a series of acts, which themselves when completed will constitute a crime; that "preparation" is merely the organizing of forces and resources to be used later, and does not signify overt hostile acts; that the mere possession of literature such as has been introduced by the State does not constitute the crime of attempting to incite insurrection.

(9) That all evidence on the Foster-Ford Political Clubs be excluded from consideration by the jury, since the Communist Party, in this State, is — legal Party and therefore entitled to existence in this State.

(10) That all books, periodicals, letters, leaflets and other material, the whole of which was not read to the jury in order that the jury might consider the full purport and meaning of such books, periodicals, letters, leaflets and other material be excluded from the consideration of the jury.

(11) That it is impossible for you gentlemen of the jury to comprehend the full message of the authors of the books, periodicals, letters, leaflets and other materials introduced

in evidence by the State, unless the whole of such books, periodicals, letters, leaflets and other materials were read in full to the jury; I charge you to disregard such excerpts as being incomplete and insufficient to apprise you gentlemen of the jury of their full content and purport.

[fol. 202] (12) That there is a difference between demonstration and insurrection.. "Demonstration" is the public exhibition of one's sympathy towards a social or political movement. "Insurrection" is resistance with force against the lawful authority of the State of Georgia.

IN SUPERIOR COURT OF FULTON COUNTY.

No. 37812

THE STATE

VS.

ANGELO HERNDON

Verdict ~~of Guilty~~ and Recommend Mercy

JUDGMENT

Whereupon, it is ordered and adjudged by the Court that the Defendant, Angelo Herndon be taken from the Bar of this Court to the jail of Fulton County, and be there safely kept until a sufficient guard is sent for him from the Georgia Penitentiary, and be then delivered to, and be by said guard taken to said Penitentiary, or to such other place as the Governor may direct, where he, and the said Angelo Herndon be confined at hard labor for the full term of not less than Eighteen (18) years, and not more than Twenty (20) years, to be computed as provided in the Act approved August 27, 1931.

By the Court Jan. 18, 1933.

L. B. Wyatt, Judge S. C. C. C., presiding. John A. Boykin, Solicitor General.

[fol. 203] In Superior Court of Fulton County

[Title omitted]

Pauper Affidavit—Filed July 13, 1933

Personally appeared before me the undersigned, Angelo Herndon, Plaintiff in Error in the Bill of Exceptions filed in the above stated case, and on oath says that he is, because of his poverty, unable to pay the costs in said case.

Angelo Herndon, Plaintiff in Error.

Subscribed and sworn to before me, this 13th day of July, 1933.

H. E. Hutcheson, Dep. Sheriff, Fulton County, Georgia.

[File endorsement omitted.]

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 204] [File endorsement omitted.]

[fols. 205-224] In Superior Court of Fulton County

[Title omitted]

Order to Transmit Additional Portion of Record—Filed Aug. 1, 1933

It coming to the attention of the Court that the counter-showing of the State to the motion for new trial was not specified in the bill of exceptions, and not certified as part of the record to be transmitted, and it appearing that said counter-showing is relevant to the issues raised and should be included in the record, it is Ordered: That the clerk of Fulton superior court transmit and send up to the Supreme Court of Georgia, with the balance of the record in said case, the counter-showing of the State to the motion for

new trial, which was allowed as part of the record by the court and filed in the case.

This July 14, 1933.

L. B. Wyatt, Judge S. C. Coweta Cir., presiding.

[File endorsement omitted.]

[fol. 225] IN SUPREME COURT OF GEORGIA

No. 9871

HERNDON

v.

THE STATE

OPINION—May 24, 1934

By the COURT:

1. Conclusions by the trial judge upon preliminary and collateral issues, such as are made by a plea in abatement to an indictment, or a challenge to the array of the trial jurors, and a traverse to each respectively, cannot properly be asserted as grounds of a motion for a new trial relating to the main and final issue as made by the indictment and the plea of not guilty.

(a) Where several rulings are complained of in a bill of exceptions in a criminal case, this court can consider only such as were made within twenty days before the tendering of the bill of exceptions, unless exceptions pendente lite were taken. No exceptions pendente lite were filed in the present case.

(b) Under the foregoing rulings, no question of error in the preliminary rulings is presented by the instant record.

(c) Even upon the merits it could hardly be said that any error was committed.

2. The statutory voir dire questions were propounded to the jurors separately. Counsel for the defendant, a negro, was further permitted to inquire of the jurors whether they had any racial prejudice such as would pre-

vent the rendition of a fair and impartial verdict. This question was propounded to the jurors in panel of twelve, but a request to put the question to each juror separately was denied. The judge did not err in denying this request.

3. The documents found on the defendant's person and in the room where he lodged were not inadmissible in evidence upon the ground that the solicitor-general had not [fol. 226] exhibited any warrant authorizing a search of the defendant's person or his room.

4. Under the facts of this case it was not cause for a new trial that the court refused to exclude the evidence of the witness given on cross-examination: "A negro doesn't happen to have the right to marry my daughter, under the laws of this State. I do not know how many States there are in the union where they do have that right." The only objection urged to this evidence was, "There is nothing whatever in the Communist 1932 platform about intermarriage." Nor was it reversible error that the court permitted the solicitor-general to ask the same witness, on cross-examination: "Do you understand the Communist position equal rights for negroes to mean the right of a colored boy to marry your daughter, if you have one?" over objection that the question was irrelevant and immaterial and called for a conclusion of the witness.

5. The ground of the motion for new trial assigning error upon the court's refusal to permit a witness "to qualify as an expert to testify to the non-insurrectionary character of documentary evidence introduced by the State" does not show reversible error. Nor was it cause for a new trial that the court permitted the same witness to give evidence of well-known historical facts, over objection that the questions responded to necessitated an opinion, and required the witness to answer "with particular detailed knowledge of political science."

6. Where a remark is made by a trial judge in the presence of the jury in ruling upon the admissibility of testimony, which remark the defendant's attorney deems to be of such character as to prejudice the minds of the jurors against his client, the attorney should move for a mistrial. The question of the propriety of such remark cannot be raised for the first time in a motion for new trial.

[fol. 227] 7. The defendant being on trial for the offense of attempting to incite an insurrection, the court did not err in defining the offense of insurrection, where the jury were further told that the defendant was on trial, not for that offense, but for the alleged attempt to incite an insurrection. It was not error to fail, without request, to instruct the jury as to the meaning of the phrase "combined resistance to the lawful authority of the State," as contained in the definition of each of these offenses.

8. There was no merit in any of the grounds of the motion for new trial assigning error upon extracts from the court's charge.

9. Nor did the exceptions to the refusal of the requests to charge show error.

10. A witness for the State referred to the defendant as a "darkey." By a plea filed the defendant alleged that he was a member of the negro race. He contended that the term used by the witness was one of opprobrium and was highly prejudicial. The court declined to agree or disagree with this contention, but directed the witness to refer to the accused as the defendant. Held, no error.

11. The defendant was indicted for the offense of attempting to incite an insurrection, in violation of the Penal Code, § 56. The evidence authorized the verdict of guilty as returned against him; and no substantial error of law having been committed, the court did not err in refusing a new trial.

[fol. 228] BELL, J.:

Angelo Herndon was indicted in Fulton County for the offense of attempting to incite an insurrection. The offense is defined in Penal Code, § 56, as "Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State." Section 57 declares that any person convicted of this offense shall be punished by death unless the jury recommend mercy, in which event the punishment shall be confinement in the penitentiary for not less than five nor more than twenty years. In this case the jury found the defendant guilty, but recommended mercy and fixed his punishment at from eighteen to twenty years.

Before pleading to the merits, the defendant filed a motion to quash the indictment, and also a plea in abatement, alleging in each that he was a negro, and that members of his race were unlawfully, systematically, and intentionally excluded from the grand jury which indicted him, in direct violation of the fourteenth amendment to the constitution of the United States and of paragraph 3, article 1, of the constitution of the State of Georgia. The solicitor-general did not demur, but filed a traverse to each of these proceedings, and the issues made thereby were by consent of counsel submitted for trial to the judge without a jury. After hearing evidence at length from jury commissioners and others, the judge overruled and denied both the motion and the plea. Upon the call of the panel of 48 jurors from which to select a trial jury, the defendant filed a challenge to the array based upon the same ground, namely, that negroes were unlawfully, systematically, and intentionally excluded from the panel for the January term, 1933, during which the defendant was about to be tried. As in case of the other preliminary proceedings, the solicitor-general did not demur, but filed a traverse, and the issue thus made was likewise submitted to the judge for [fol. 229] trial upon the evidence without a jury. After evidence was submitted, the motion was overruled.

The defendant was then tried upon the charge contained in the indictment with the result indicated. He made a motion for a new trial which contained the usual general grounds and a number of special grounds added by amendment. The motion was overruled upon all grounds, and the defendant brought the case to this court.

1. The rulings by the trial judge upon the motion to quash, the plea in abatement, and the challenge to the array were all made on January 16, 1933. No exceptions pendente lite were filed to any of these rulings, but they were assigned as error in the motion for a new trial and also in the bill of exceptions. The judgment refusing a new trial was rendered on July 5, 1933. The bill of exceptions was certified on July 12, 1933.

Under the settled rules of practice applicable in this State, the rulings and findings of the trial judge upon the preliminary issues could not properly be asserted as grounds of the motion for a new trial relating to the main and final issue as made by the indictment and the plea of

not guilty; but the conclusions reached by the court on such preliminary or collateral issues should have been excepted to pendente lite, or assigned as error in due time in the bill of exceptions. Williford v. State, 121 Ga. 173 (2); Jones v. State, 130 Ga. 274; Herrin v. Grannis, 40 Ga. 581; Jones v. Daniel, 106 Ga. 850; Strickland v. State, 115 Ga. 222; State Mutual Asso. v. Kemp, 115 Ga. 355; Waters v. State, 158 Ga. 510; Whitten v. Barrow, 159 Ga. 57; Benford v. State, 18 Ga. App. 14 (4). Accordingly, the motion for a new trial, so far as it pertains to these matters, does not present any question of error for decision by this court. [fol. 230] The assignments of error upon the same rulings as contained in the bill of exceptions are also fatally defective, though for the different reason that they were not made in time. In all criminal cases the bill of exceptions shall be tendered and signed within 20 days from the rendition of the decision complained of. Civil Code (1910), § 6153. This applies, of course, to the final bill of exceptions by which the case is brought to the appellate court. As to exceptions pendente lite, it is declared: "Exceptions tendered before the final judgment, for the mere purpose of being made a part of the record, shall be certified to be true by the judge, and ordered to be placed on the record. Such exceptions must be tendered during the term. But, if the court shall adjourn within less than thirty days from the date of the ruling complained of, such bill of exceptions pendente lite must be tendered within sixty days from the date of the order, decision, or ruling complained of." Civil Code (1910), § 6154. This provision of the law applies to both civil and criminal cases. Strickland v. State, 115 Ga. 222, 224. "Where several rulings are complained of in a bill of exceptions in a criminal case, this court can consider only such as were made within twenty days before the tendering of the bill of exceptions, unless there be exceptions pendente lite." Regopoulas v. State, 115 Ga. 232. See also Banks v. State, 114 Ga. 115 (1); Scarboro v. State, 24 Ga. App. 27 (3a), 29, and cit. It follows that since the rulings of the court upon the preliminary issues were not excepted to pendente lite, nor assigned as error in the bill of exceptions within the time prescribed by law, the plaintiff in error is not entitled to a review of these rulings.

But even if we should go further and consider these rulings upon their merits, the result could hardly be different to the plaintiff in error. The burden was upon him to show by evidence that negroes were excluded form the jury lists [fol. 231] on account of their race or color. Martin v. Texas, 200 U. S. 316. Nothing to the contrary was held in either Neal v. Delaware, 103 U. S. 370, or in Carter v. Texas, 177 U. S. 442. In each of these cases the claim was disposed of as being insufficient in law, without affording the defendant the right to sustain it by proof. In the present case evidence was heard and findings were made thereon by the trial judge. Jury commissioners testified that negroes were never excluded by reason of their race or color, and that in fact members of this race were occasionally placed upon the lists for service on trial juries. The commissioners further testified: They recognized that there were taxpayers of Fulton County of the negro race who were qualified for jury service, but for the most part those who were thus qualified were professional men or holders of governmental positions and were excused by law from jury service. The population of Fulton County is large and the commissioners could not well place every man on the lists who might be legally qualified. It seems that under this evidence the trial judge was not bound, as a matter of law, to find that negroes were excluded merely on account of their race or color. He could not have done so without imputing perjury to the jury commissioners who testified. This court, under its constitutional jurisdiction, would not be authorized to reverse the findings of the trial judge if they were supported by any evidence. In Martin v. Texas, supra, it was said that discrimination cannot be established by merely proving that no one of the defendant's race was on the jury, and that an accused person cannot, of right, demand a mixed jury, some of which shall be of his race, nor is a jury of that kind guaranteed by the fourteenth amendment to any race. It was further said in that case *that case* that "What an accused is entitled to demand, under the constitution of the United States, is that in organizing the grand jury as well as in the impanelling of the petit jury, [fol. 232] there shall be no exclusion of his race, and no discrimination against them, because of their race or color." In Thomas v. Texas, 212 U. S. 278, it was said that the question of unlawful exclusion is one of fact. In Murray v.

Louisiana, 163 U. S. 101, the evidence was similar to that produced in the present case and it was said by the highest court that a careful inspection of the record failed to disclose any particular in which the accused was deprived of any right or immunity granted him under the laws or constitution of the United Sates. See also to the same general effect State v. Cook, 81 W. Va. 690 (95 S. E. 794); Washington v. State, 95 Fla. 298 (116 So. 470). The evidence in each of the following cases was materially stronger for the defendant. Lee v. State, Md. (161 Atl. 284); Carrick v. State, Okla. (274 Pac. 896). In Rawlins v. State, 124 Ga. 31, affirmed in 201 U. S. 638, it was said: "The law passed by the general Assembly for the purpose of carrying into effect the constitutional provision does not require that all persons possessing the constitutional qualifications shall be selected. It reposes in the jury commissioners not only the authority to determine what men have these qualifications, but how many of such men shall be selected for jury duty in the county. The jury commissioners may select all belonging to this class, or they may select a lesser number. The jury-list of the county is not to be made up of any given number, but this is a matter left to the discretion of the jury commissioners. The number of persons selected for jury service is to be determined by the jury commissioners in the exercise of a wise discretion, taking into consideration the whole number of persons liable to jury service, the volume of business to be transacted in the various courts which require the presence of jurors, as well as the facilitation of business in such courts. They should keep in mind on the one hand the rights of those entitled to a jury trial, whether in civil or criminal cases, and on the [fol. 233] other hand the rights of those who are subject to jury duty, making the list embrace such a number as will enable the courts to be carried on according to the spirit of the constitution and the law, and at the same time not making the number so small that jury service would become burdensome upon those selected for that duty. One placed upon the jury lists by the commissioners is, so far as jury service is concerned, declared to be intelligent and upright. But the fact that a person's name is not upon the jury-list of the county is no evidence that he is not intelligent and upright, nor that the commissioners did not consider him as such." See also Davis v. Arthur, 139 Ga. 74 (2).

The grounds of the motion for a new trial referred to above were those numbered 9, 10, 11, and 12. Ground 13 complained of the rejection of evidence that negroes of Fulton County had served as jurors in the Federal Court. If exception had been duly preserved, this contention would not have contained merit since the evidence was irrelevant.

2. In ground 25 it is complained that the court erred in refusing to allow the defendant's counsel to ask the jurors individually and severally, on the voir dire, the question, "Have you any prejudice against the defendant because he is colored, which would prevent you from arriving at a verdict on the trial of this case?" In this ground of the motion is the following statement: "Movant stated in his place that if prospective jurors on their voir dire had been permitted to answer the said question, defendant would have been better able to avail himself of his constitutional rights to select a fair and impartial jury for the trial of said case. The court refused to permit said question to be asked of said prospective jurors on their voir dire on the ground that the laws of the State of Georgia prohibited or made no provision for such question to be asked severally and individually, but the court allowed on movant's motion [fol. 234] said question to be propounded to the prospective jurors in groups of twelve as they were impaneled in the jury box. Movant insists that the refusal of the court to permit such question to be asked was prejudicial to movant, for the reason that movant did not have due opportunity to avail himself of his constitutional right to select a fair and impartial jury and because said refusal was and is a denial unto the defendant of equal protection of the laws and a denial unto him of the due process of law as guaranteed unto him by the fourteenth amendment to the constitution of the United States, section 1," quoting it.

This ground of the motion fails to show cause for a new trial. The method of examining jurors on the voir dire is regulated by statute in this State. Ga. Laws 1855-6, p. 230. The provisions of this act are now contained in Penal Code (1910), §§ 999-1004. The questions to be propounded are stated in section 1001, and include inquiry (1) as to whether the juror has formed or expressed any opinion in regard to the guilt or innocence of the prisoner at the bar; (2) as to whether he has any prejudice or bias on his mind either for or against the prisoner at the bar; and (3) whether the

mind of the juror is perfectly impartial between the State and the accused. Since the passage of the act of 1856 this Court has consistently held that neither counsel for the State nor for the defendant may, as a matter of right, ask a juror upon the voir dire any other questions than those prescribed by statute. In Woolfolk v. State, 85 Ga. 69 (9) 95, it was said: "Questions could not be made more searching than these, in order to determine the state of the juror's mind." But so careful was the law to provide for a fair and impartial jury that it did not stop with merely prescribing certain questions. It outlined a procedure whereby additional questions might be propounded. In § 1604, it is provided in effect that when any juror has been found competent "as aforesaid" he may yet be put upon the judge as a trior and shown to be incompetent at any [fol. 235] time before the submission of evidence on the main issue. The judge, acting as a trior, is not confined to the statutory questions, but in order to test the juror's qualification may ask him any question except such as would tend to inculpate or disgrace him. It is true the additional examination may not be had as a matter of right, unless the juror is challenged and put upon the court as a trior. But the machinery provided for testing the juror's competency would seem to meet all constitutional requirements. In the Woolfolk case, supra, it was held that the statutory procedure was not in violation of the constitution of Georgia or the United States. The defendant here did not pursue this procedure but sought, without challenging any juror, to propound additional questions to each of them. Under the practice in this State of trying the competency of jurors, only the statutory questions can be asked in the first instance. If the juror answers the statutory questions satisfactorily, and is pronounced prima facie competent, and the parties put him before the court as trior, aliunde evidence of the untruthfulness of his answers must be offered, and it is not competent to propound questions to the juror himself to show his incompetency. It is within the province of the court to permit a further examination of the juror himself in rebuttal of the testimony offered to show his incompetency. Nesbit v. State, 43 Ga. 238, 248; Carter v. State, 56 Ga. 463 (3)." Polk v. State, 148 Ga. 34 (2). See also Chapman v. State, 148 Ga. 531 (4); Duncan v. State, 141 Ga. 4. While the defendant

may not, as a matter of right, extend the examination beyond the statutory questions without first putting the juror on the court as a trior, it is yet true that the court may in its discretion allow additional questions. Alford v. State, 137 Ga. 458 (3). As a matter of fact, the court did allow the additional question in the instant case. The question was actually propounded to each and every juror. The question was put to them, however, in panels of 12, and [fol. 236] the whole substance of the complaint is that each juror was not interrogated individually and severally. Since the judge had a discretion as to whether he would allow the question, and did allow it, he might, within the same discretion, have permitted the requested individual examination, and thus was not strictly correct so far as he may have held, as stated in the motion, that the law prohibited such examination. The legal misconception, however, did not deprive the defendant of more than the mere right to have the judge exercise a discretion as to whether the question should be put to the jurors singly or in panels, involving a mere matter of procedure, with respect to which the statute is silent, and not relating to any substantive right. In Williams v. State, 60 Ga. 367, followed in Wilkerson v. State, 74 Ga. 398, it was held that the examination on the voir dire should be made separately as to each juror, but this was based upon a construction of the statute and related merely to the *statutory* questions and *not to such additional questions* as might be asked only in the discretion of the court. The statute provides that on trials for felonies "any juror" may be put upon "his" voir dire, and the following questions shall be propounded to "him." Then follows the prescribed questions, all of which were presumably propounded singly in this case. See Penal Code, § 1001. It was obviously the quoted singular words which constrained the decision in the Williams case. In the present case, the judge, having exercised his discretion so as to allow an additional question, did not violate any substantial right of the defendant in refusing, for any reason, to permit the question to be propounded to each juror separately as requested. It should be noted further in this case that the defendant in his motion for a new trial does not complain that the action of the judge was erroneous upon the ground that he failed to exercise a discretion with which he was vested by law; but the assignment is that an

absolute constitutional right was denied to movant. The [fol. 237] judge pursued the course prescribed by the statute, except that he went further in the defendant's favor than the statute required him to do. The statute was not attacked as being unconstitutional, and it is merely claimed that the action of the court, not the statute, deprived the defendant of a constitutional right. Did the court, merely in requiring the one question to be propounded collectively, as indicated, instead of singly, deny to the defendant any right guaranteed to him by the fourteenth amendment of the Federal constitution? We do not think the constitution was ever intended to be reduced to so thin a tissue. In West v. Louisiana, 194 U. S. 258, it was said: "The limit of the full control which the State has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution." In Jordan v. Massachusetts, 225 U. S. 167, the United States Supreme Court, quoting L. & N. Railway Co. v. Schmidt, 177 U. S. 230, 236, said: "It is no longer open to contention that the due process clause of the fourteenth amendment to the constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend." It was further said in the Jordan case that "When the essential elements of a court having jurisdiction in which an opportunity for a hearing is afforded are present, the power of a State over its methods of procedure is substantially unrestricted by the due-process clause of the constitution." 2 Honnold's Supreme Court Law, 846-850.

It cannot be said that the defendant was denied due-process of law or the equal protection of the laws merely [fol. 238] because the question was propounded to the jurors in panels of 12 and not separately. Certainly nothing to the contrary was held in Aldridge v. U. S., 283 U. S. 308. In that case the court refused to permit any sort of inquiry as to whether the jurors had any racial prejudice such as would prevent a fair and impartial yerdict. Furthermore, the Aldridge case was appealed from the District of Co-

lumbia, and an examination fails to show the existence of any statute in the District similar to the Georgia law. The same is true of the statutes of the several states from which decisions are cited in the Aldridge case. The question here is also different from that presented in Bailey et al. v. United Sta , 53 Fed. (2) 982. Under the rule in the Federal District Court (in Georgia) from which the case was appealed, the names of the jurors were not published or communicated to any one prior to the convening of court. It was pointed out in the decision that "the only information as to the persons whose names were on that list possessed by appellants and their counsel before the right of challenging was to be exercised was that derived from looking at the prospective jurors and hearing their names read from the list and their answers to the three questions propounded by the court." It was held that the right to challenge was one of the most important of the rights secured to the accused, and that "it should not be required to be exercised before an opportunity is given for such inspection and examination of prospective jurors as is reasonably necessary to enable the accused to have some information upon which to base an exercise of that right." It is not contended here that the defendant was surprised or circumscribed by any such rule as was of force in the Federal District Court. The present case is further distinguished from the Bailey case upon the broad ground that in that case, as well as in the Aldridge case, supra, the court summarily [fol. 239] "disposed of the requests, *wholly and absolutely* refusing to permit the additional questions urged." This is not to say that the decision in the Bailey case was in conformity with the statute law of this State.

3. The defendant was arrested without a warrant by police officers of the City of Atlanta. At the time of his arrest certain documents were found in his personal possession, in a "box under his arm," and this box and its contents were taken into custody by the arresting officers. Following the arrest, the defendant stated that he was coming at a certain place to which the officers then carried him. The room identified by the defendant as his place of abode was searched and other documents were found. Ground 1 of the motion for a new trial complains of the ruling of the court admitting in evidence the "documents found in the personal possession of movant • • •

in a box under his arm," the evidence having been objected to upon the ground that the solicitor-general had "not exhibited any search warrant which authorized any officer to search defendant's person, nor has the solicitor exhibited any search warrant which authorizes any officer to enter the defendant's room and seize the box and contents contained therein." This ground of the motion contains several additional statements as reasons why the court should not have admitted the evidence. These additional statements cannot be considered. It is the province of this court to consider only such questions as were presented to the trial court. Civil Code (1910), § 6502. Accordingly, an assignment of error on the admission of evidence is limited by the objections made at the time the evidence was offered. The objections cannot be enlarged by the addition of new matter as argument or grounds of error in the motion for new trial. Williams v. State, 147 Ga. 53 (1); Henslee v. Harper, 148 Ga. 621; Jenkins v. Jenkins, 150 Ga. 77 (1). It may be said now that other grounds of the motion for a new trial contained the same defects and attention is here called [fol. 240] to that fact in a general way in order to avoid needless repetition as we come to consider the other grounds. In the main we shall notice only such objections to the evidence as were made at the time the evidence was offered, and statements regarding the record will be limited accordingly.

The evidence obtained by the alleged illegal search and seizure was not inadmissible upon that ground. In the argument here the defendant relies upon the provisions of the constitution which are contained in Civil Code (1910), § 6362, relating to illegal searches, and it is further urged with great earnestness that the evidence should have been excluded in view of the similar provisions contained in the 4th amendment of the Federal constitution. Civil Code (1910), § 6688. So far as the objections relate to an application of the State constitution, the case is controlled by the decision in Calhoun v. State, 144 Ga. 679. It was held in that case that evidence discovered by the search of a person while he was under an illegal arrest, if relevant, is not inadmissible as contravening the constitutional provision against compelling a person to give testimony against himself. It was further held that articles taken from the premises of the accused may be admitted in evidence against him not-

withstanding that they were discovered by an unlawful search and seizure. In such cases the criterion is, who furnished or produced the evidence? If the person suspected is made to produce the incriminating evidence it is inadmissible, but if his person or belongings are searched by another and the accused is not compelled to do any act or to produce any evidence tending to incriminate himself, the evidence thus discovered may be used against him, although it was obtained "without a vestige of authority." In the present case, it does not appear that the defendant was com- [fol. 241] pelled to do any act or to produce any evidence. The decision in the Calhoun case, supra, was rendered by a full bench, and requests to overrule it have been denied in Kennemer v. State, 154 Ga. 139 (3); Lester v. State, 155 Ga. 882 (4); Jackson v. State, 156 Ga. 647 (2).

With reference to the like provisions of the Federal constitution as contained in the 4th amendment, it has been repeatedly held by the Supreme Court of the United States that these provisions refer to powers to be exercised by the government of the United States and not to those of the individual states. See the discussion and citations in Johnson v. State, 152 Ga. 271, and in Kennemer v. State, supra. Moreover, the Supreme Court of the United States has also held that these provisions do not apply to evidence obtained by State or city officers so as to exclude it even in Federal prosecutions, where the officers were not acting with a view to such prosecution or in conjunction with Federal officers in obtaining the evidence. Weeks v. U. S., 232 U. S. 383; Byars v. U. S., 273 U. S. 28 (4); Gambino v. U. S., 275 U. S. 310. Compare U. S. v. O'Dowd, 273 Fed. 600; Landwirth v. U. S., 299 Fed. 281 (4); Gordon v. U. S., 18 Fed. (2d) 530; Crank v. U. S. 61 Fed. (2d) 981. It is also the Federal rule that where the defendant knows before the trial of the possession by the prosecution of physical evidence and the manner in which it was obtained, he cannot wait until the trial to make objection thereto, but should make his objection beforehand, and, failing to do so, he waives the right to object to the introduction of the evidence at the trial. Rossini v. U. S., 6 Fed. (2d) 350 (5); Moore v. U. S., 56 Fed. (2d) 794 (5), citing decisions by the United States Supreme Court. So in any possible view of the instant case, the court did not err in admitting the evidence referred to in the first special ground of the motion for a new trial.

[fol. 242] There is no merit in ground 8, contending that the documentary evidence was inadmissible because the State did not introduce evidence to show that it was insurrectionary. The evidence was not objected to upon this ground, and besides this the literature referred to in this ground was in plain language and would speak for itself.

4. In ground 4 it is contended that the court erred in permitting a witness for the defendant to testify on cross examination: "A negro doesn't happen to have the right to marry my daughter, under the laws of this State. I do not know how many states there are in the Union where they do have that right." This evidence was objected to on the sole ground, "There is nothing whatever in the Communist 1932 election platform about intermarriage." In ground 5, it is complained that the court erred in allowing the prosecuting attorney to propound the following question, "Do you understand the Communist position equal rights for negroes to mean the right of a colored boy to marry your daughter, if you have one?" over the objection that the question is "irrelevant and immaterial and calls for a conclusion of the witness." In ground 6, it is contended that the court erred in permitting the prosecuting attorney to ask the following question, "Did you know there are twenty states in the United States where the two races (white and negro) intermarry or mix?" over the same objection as quoted from ground 5.

Upon a consideration of ground 4 in connection with the brief of evidence and with grounds 5 and 6, it is clear that the evidence objected to as stated in ground 4 was given under the following circumstances: The evidence tended to show that the defendant was sent to Atlanta as an organizer for the Communist party, and that certain literature found in his possession was forwarded to him from headquarters of this party in New York. Witnesses testified to [fol. 243] admissions by the defendant of these facts. Among the documents was what purported to be a platform of the Communist party as promulgated during the presidential campaign of 1932. Plank 4 was as follows: "Equal rights for the negroes and self-determination for the Black Belt." The witness had testified that he was familiar with all of the principles contained in the platform, and that he was in sympathy with some of them. On cross-examination the assistant solicitor interrogated him

as to the meaning of plank 4, and finally asked him if he understood it to mean the right of a colored boy to marry the witness's daughter, if he had one. To this question the witness gave the reply as to the law of Georgia. The solicitor then asked him about other States, and his reply is the second statement of the testimony objected to. Other documents found in the defendant's possession and introduced in evidence tended to show that the Communist party did advocate racial and social equality for the Negro. These documents were admitted in evidence without objection, except for invalid reasons as indicated in division 3 of this opinion. It is a general rule of practice based upon sound principle that the admission of evidence over a party's objection will in no event require the grant of a new trial when substantially the same evidence is admitted without objection. Payne v. Miller, 89 Ga. 73; Knorr v. Raymond, 73 Ga. 749 (10); Waters v. Wells, 155 Ga. 439 (4). Thus, the question of racial and social equality, including, of course, the right of intermarriage, was already in the case in such a way that the jury were bound to know of it in any event, and, so, the testimony objected to did not introduce a new factor. The defendant, therefore, could not be harmed by this testimony. The witness was correct in his statement as to the law of Georgia. Penal Code, § 678. It is to be remembered also that the sole objection was that there was nothing in "party 1932 plat- [fol. 244] form" about intermarriage. While the assistant solicitor had asked about the platform, the witness made a detour and spoke of an entirely different subject, namely, the law of Georgia. It is thus apparent that the admissibility of the testimony did not depend upon the contents of the party platform, and that the court did not err in admitting it over the sole objection urged. Cf. 22 C. J. 195, and cit.

Referring now to grounds 5 and 6, we notice that each of these grounds omits all reference to evidence, the assignments of error being aimed only at the questions themselves. "In order to raise a question for decision by this court as to whether the trial court erred or not in overruling objections of the defendant to questions propounded by the solicitor-general to a witness, the answers to the questions should be shown, and a reference to the brief of evidence is not sufficient." Fouts v. State, 175 Ga. 71 (13).

A ground of a motion for new trial must be complete in itself, without reference to other parts of the record. Blakeney v. Bank of Hahira, 176 Ga. 190 (2). If a question standing alone is inherently improper and prejudicial, the remedy is a motion for a rebuke or for a mistrial. Civil Code (1910), § 4957.

But to look further still, the witness was on cross-examination. The defendant himself, on direct examination, had interrogated the witness, not only as to the party platform of 1932, but had asked some other questions in reference to Communism. In response to the defendant's examination, the witness testified that without being informed as to the definition of Communism he could not answer the question as to whether he was "sympathetic with Communism." He did testify, however, "I find elements within Communism with which I agree." The defendant himself had brought about an expression of the attitude of the wit- [fol. 245] ness introduced by him. As noted above the evidence tended to show that the tenets of the Communist party included racial and social equality for the Negro (see documentary evidence quoted below, in division 11 of this opinion). This witness, like any other witness, was subject to cross-examination. The right of cross-examination, thorough and sifting, belongs to every party as to witnesses called against him. Civil Code (1910), § 5871; Mitchell v. State, 71 Ga. 128 (6). This is a right which may be claimed by the State as well as by any other party.

Finally, the jury could not reasonably have been drawn from the main issue by any of the happenings referred to in grounds 4, 5, and 6. They were presumed to be intelligent and upright. They were aware of the fact that the defendant was on trial for the offense of attempting to incite an insurrection. A definition of this offense was later given to them in the charge. They must have known that the defendant could not be convicted merely because he may have become aligned with a party which advocated racial equality, and also that neither the statement of the witness nor the questions of the State's attorney could throw any affirmative light on the issue of guilt or innocence of the accused. Regardless of every other consideration in relation to these grounds, we should be compelled to attribute to the jurors a lesser degree of intelligence and uprightness, than we are willing or authorized to do, be-

fore we could hold that the occurrences referred to in these grounds were such as to vitiate the verdict. The jurors had sworn that they had no such racial prejudice themselves as would prevent the rendition of a fair and impartial verdict, and we cannot assume that they were inflamed by anything alluded to in the grounds under consideration, as urged in the briefs but not alleged in the motion for a new trial.

This case differs quite materially on its facts from Williams v. State, 25 Ala. App. 342 (146 So. 422), where the [fol. 246] court did not effectually restrain highly inflammatory arguments by the prosecuting attorney, notwithstanding repeated objections thereto.

5. In ground 2, it is complained that the court erred in refusing to permit a witness who was a college instructor, and who was introduced by the defendant, to "qualify as an expert to testify to the non-insurrectionary character of the documentary evidence introduced by the State." The motion states that the witness gave certain testimony showing his proficiency in the subject of economics and his acquaintance with anarchistic, sociological, and Communistic literature, and also testified that he had written articles of an economic nature. This ground of the motion fails to set forth the "documentary evidence" as to which an opinion of the witness would have been sought, nor is it averred that the witness *would have* answered that it was "non-revolutionary" or "non-insurrectionary." To constitute a good assignment of error the exception should have stated at least the substance of the documentary evidence as to which the witness was expected to give an opinion, and it is also the rule that "A ground of a motion for new trial which assigns error because the court excluded certain testimony of a witness will not be considered where the movant has failed to show that the court was advised as to what the answer of the witness would be. Story v. Brown, 98 Ga. 570 (25 S. E. 582); Freeman etc. Co. v. Mencken, 115 Ga. 1017 (42 S. E. 369); Cox v. Moore, 142 Ga. 487. The motion does not even indicate that the witness was expected to give an opinion as to the meaning of technical language, but so far as appears, it was the purpose of the defendant to interrogate him as to the meaning of words as familiar to the jury as to anyone else. "An expert may aid the jury, but he cannot perform the

functions of a juror and, under the guise of giving testimony, state a legal conclusion." Travelers Ins. Co. v. [fol. 247] Thornton, 119 Ga. 455. See also Kennedy v. Phillips, 34 Ga. App. 166 (3).

In ground 3, it is contended that the court erred in permitting the same witness, on cross-examination, to testify as follows: "I am acquainted with what is known as the Communists of Soviet Russia or the Soviet Union, of the present form of government in the nation of Russia, that it is a government which succeeded in the Kerensky government, which succeeded in the former Czarist government; that it was brought about by a revolution, putting out the Czar and the assassination of the Czar and his family some time later, not necessarily as the result of a revolution. As to the Russian revolution, history so regards it that there was a revolution, the Czarist government overthrown, the Kerensky government took charge, and after about six months another revolution of bloodless character in which the present regime succeeded the Kerensky government; I wouldn't attempt to dispute that as an historical fact." The defendant objected to this evidence at the time the same was offered on the following ground: "Those were all questions that necessitate an opinion and required (the witness) to answer with particular detailed knowledge of political science." This evidence was not inadmissible for the reason urged by the defendant. The facts stated by the witness were of an historical nature and were generally known. The jury presumably knew of them anyway, and the defendant was not harmed by the admission of the testimony. 23 C. J. 116-121.

6. In ground 7 of the motion for new trial it is alleged that during the progress of the trial the judge erred "in that he did intimate that movant was guilty" by the following statement made in the presence of the jury while a witness for movant was testifying: "The Court: 'If Emory University is guilty of anything, we will try them; [fol. 248] I think even if Emory University had actually attempted to incite riot, it wouldn't be material in this case, it is a question what this defendant has done.'" The record contains a note by the trial judge to the effect that the remark was made in ruling on an objection to testimony. Whether or not the statement might have been subject to criticism, it was not made as a part of nor during the

instructions to the jury. The proper mode of excepting to this statement was by motion for mistrial, and the defendant failed to adopt this procedure. He could not abide the chance of a favorable verdict, and "after the return of an adverse verdict, have that verdict set aside" on a motion for a new trial. Tanner v. State, 163 Ga. 121 (9) 130, and cit. See also Herndon v. State, 45 Ga. App. 360 (4).

7. In ground 14 error is assigned upon an instruction of the court which contained the definition of insurrection as in the Penal Code, § 55. The court further instructed the jury as to the legal statutory definition of an attempt to incite insurrection, and of course it was not improper, in connection therewith, to define the offense of insurrection, the purpose being to give the jury a better understanding of the elements of the alleged offense for which he was being tried. The jury were specifically told that the defendant was being tried for an alleged attempt to incite insurrection. It was not error, as contended, to fail in the same connection to instruct the jury as to the method or means by which to determine the meaning of the offense "combined resistance to the lawful authority of the State," as contained in the definition of insurrection. Hull v. State, 133 Ga. 177 (8).

8. In ground 15 it is alleged that the court erred in charging the jury "that mere possession of literature insurrectionary in its nature on the part of the accused wouldn't warrant a conviction in this case, nor would engaging in academic or philosophic discussions of abstract [fol. 249] principles of economics or politics or other subjects however radical or revolutionary in their nature." This charge was excepted to on the ground that it assumed that the literature introduced in evidence was insurrectionary and thus invaded the province of the jury. There is no merit in this contention. And this is specially true in view of the additional instructions to the effect that all evidence of the crime must appear from the evidence and the defendant's statement, to the satisfaction of the jury, that the court "can express no opinion and does express no opinion as to what has been proven."

In ground 16 it is contended that the court erred in charging "that advocacy. however reprehensible morally,

is not sufficient to convict the defendant where there is no evidence to indicate that the advocacy would be acted upon immediately. In order to convict the defendant, gentlemen, it must appear clearly by the evidence that immediate serious violence against the State was to be expected or advocated." It is contended that this charge was argumentative, and intimated that advocacy had been proved, also that the alleged advocacy of movant was reprehensible morally; and that the charge otherwise unduly emphasized the contentions of the State. These exceptions were not substantial.

In ground 17 error was assigned upon an instruction that "an attempt to commit an act which is, in fact, a crime is not complete unless the alleged crime is dangerouly near completion; that the mere possession of radical literature, as I have before stated, alone is not sufficient to constitute the crime of attempting to incite insurrection." The exceptions to this charge were that it intimated that the literature was radical, that said charge failed to disclose to the jury the method by which they should determine whether the literature was radical or not, and unduly stressed the contentions of the State. There was no merit in these exceptions.

[fol. 250] In ground 18 error is assigned upon an instruction relating to admissions or incriminatory statements. The exceptions were that the charge was argumentative in the constant reference to "incriminatory statements," and contained an expression of opinion that such statements had been proved, and was confusing and misleading; also that the charge was not applicable to any facts or evidence adduced upon the trial of the case. None of these exceptions were meritorious. As to the correctness of the charge, see Morris v. State, 176 Ga. 243, and cit.

Ground 19 assigns error upon a charge to the effect that the State contended that the defendant was guilty of an attempt to incite insurrection, and that the defendant, on the other hand, "claims that he is guilty of nothing—that he is not guilty of attempting to incite to insurrection;" that the State has set out its contentions in the indictment, to which the defendant pleaded not guilty, which "raises a clear-cut issue of fact for this jury to determine under the evidence in the case and under the rules of law," as

given in the charge. The exceptions were that the charge failed to point out the issue of fact to be determined by the jury, intimated an opinion that while the defendant may not be guilty of the crime charged he must have been guilty of some crime, and that it was not applicable to any facts or evidence adduced upon the trial. Obviously these exceptions were groundless, if not frivolous. The same is true of the exceptions to the charge referred to in ground 20 of the motion, which exceptions are so insubstantial as not to require specific reference thereto.

With reference to the instruction excepted to respectively in grounds 16 and 17, it appears from the specification in the bill of exceptions and from the transcript made in compliance ther-with, that the defendant requested the court to give each of these charges. Certainly he should not except to a charge which he requested.

[fol. 251] 9. In ground 21 error was assigned upon the refusal of the court to give a charge that all evidence of the Ford and Foster Clubs be excluded from consideration by the jury, since (as contended by the defendant) the Communist party in this State is a legal party and therefore entitled to existence in this State.

Ground 22 complains of the refusal of a request to charge that there is a wide difference between demonstration and insurrection; that "demonstration" is the public exhibition of one's sympathy towards a social or political movement, and that "insurrection" is resistance with force against the lawful authority of the State of Georgia.

The fact that the Communist party may have been allowed to enter the names of its candidates upon the official ballot did not legalize its doctrines if they were in fact insurrectionary. Accordingly, there is no merit in ground 21. See, in this connection, Michie's Code of Georgia, § 138 (9).

The requested definition of the word "demonstration" was too limited in its scope, and for this reason, if not for others, the court properly refused the request referred to in ground 22.

10. Grounds 23 and 24 complained that a witness for the State was allowed to use the term "darkey" in referring to the defendant, the contention being that the word was a term of opprobrium, and that its use was highly prejudicial to the defendant. To this objection, which was urged

at the time, the court replied, "I don't know whether it is or not," but directed the witness to refer to the accused as the "defendant."

The term darkey, as applied in this State to a person of color, is not opprobrious. Webster's New International Dictionary states one of the definitions as, "A Negro. *Coloq.*"; and contains nothing to indicate that it is a term of opprobrium.

[fol. 252] 11. Having determined that no substantial error of law was committed, we now consider the question of whether the evidence was sufficient to support the verdict. Before proceeding to examine the evidence, however, it is proper to determine the exact nature of the offense alleged to have been committed. Sections 55, 56, and 57 of the Penal Code are as follows: "Insurrection shall consist in any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested, or intended to be manifested, by acts of violence." (§ 55). "Any attempt by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection." (§ 56). "Any person convicted of the offense of insurrection, or an attempt to incite insurrection, shall be punished with death; or, if the jury recommend to mercy, confinement in the penitentiary for not less than five nor more than twenty years." (§ 57).

The defendant was not on trial for the offense of insurrection, nor for an attempt to commit that offense. He was indicted simply for an attempt to *incite* an insurrection, which by section 56 is made a distinct and independent crime under the laws of this State. Gibson v. State, 38 Ga. 571; Johnson v. State, 169 Ga. 814, 817. Accordingly, the principles which might be applied in passing upon an alleged attempt to commit insurrection, or upon an alleged attempt to commit any other crime, are without any sort of relevancy to the present case. Compare Groves v. State, 116 Ga. 516; 16 C. J. 115, § 93. In U. S. v. Ford, 34 Fed. 26, it was said: "The indefinite nature of the offense, at common law, of an attempt to commit a crime, has induced the enactment of many statutes in England and this country, setting forth, in express terms, what acts shall constitute an attempt to commit the crimes referred to in such statutes." In such a case, the statute, of course, will govern.

[fol. 253] As indicated above, however, the defendant here was not indicted for an attempt to commit any offense whatsoever, but was charged with the doing of that which constituted an independent crime under the law of Georgia, namely, an attempt to induce others to join in combined resistance to the lawful authority of the State. The word "join" as used in the statute should be given its ordinary signification. It is defined in Webster's New International Dictionary as "to come together so as to be united and connected;" "to unite;" "to form a union;" or "to enter into association or alliance." The statute means then that any attempt to induce others to come together in any combined resistance to the lawful authority of the State shall constitute an attempt to incite an insurrection and shall be punishable as stated. It is immaterial whether the authority of the State was in danger of being subverted or that an insurrection actually occurred or was impending. In State v. Tachin, 92 N. J. L. 269 (106 Atl. 145), it was held competent for the State to make it an offense to attempt by speech to incite hostility and opposition even to the government of the United States. See also in this connection New Mexico v. Diamond, 86 N. M. 120 (202 Pac. 988), and note to this case in 20 A. L. R. 1535.

In State v. Quinlan, 86 N. J. L. 120 (91 Atl. 111), where the defendant was convicted under a statute making it a crime to advocate, encourage, or incite the killing or injuring of any person, or class of persons, it was held to be immaterial whether any person or class of persons were in fact killed or injured, "the gravamen of the offense being in the incitement or encouragement, and not in the actual commission of the offense." So, in the present case, it is unimportant that the defendant may not have been successful, if he did in fact attempt to induce others to join in any combined resistance to the lawful authority of the [fol. 254] State, as charged. Nor was it necessary that he attempted to induce any large number of persons to commit the offense of insurrection, since the offense could be committed by two or more persons. In re Charge to Grand Jury, 62 Fed. 828; 33 C. J. 159. Force must have been contemplated, but, as said above, the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. State v. Tachin, supra. Nor, would it be necessary to guilt, that the alleged offender should have intended that an insurrection should

follow instantly or at any give time, but it would be sufficient that he intended it to happen at any time, as a result of his influence, by those whom he sought to incite. It was the intention of this law to arrest at its incipiency any effort to overthrow the State government, where it takes the form of an actual attempt to incite others to insurrection. In Gibson v. State, 38 Ga. 571, supra, it was said of section 4250, now section 56: "This does not contemplate an attempt by the defendant at insurrection, or to commit insurrection by himself, but an attempt to incite others to join in insurrection. A person may commit the offense of an attempt to incite others to join in, or to commit insurrection who neither promises nor attempts to join in it, or commit it himself. He may stand aloof entirely when it is committed, and still he may, by his influence, have incited it, and may be responsible for it." It was further said in that case that the section as to penalty prescribed "a penalty for attempt *at* insurrection, but none for an attempt to *incite* insurrection." Hence, the defendant was discharged in that case because the statute failed to prescribe a penalty for the specific offense of which he was convicted. This defect, however, was cured by the act of December 12, 1871 (Ga. Laws 1871, p. 19), so that the provisions as to penalty are now as stated in the Penal Code, §57. From what has been said, the question here is simply this: did the evidence [fol. 255] show that the defendant made any attempt to induce others to come together in any combined forcible resistance to the lawful authority of the State? This is the only question to be determined under the evidence.

The evidence, which included certain admissions by the defendant, established the fact that he had come to Atlanta from another State as an organizer for the communist party, and that he had no other interest in view. The evidence did not show the exact time of his arrival, but it appeared that under an assumed or different name he rented a postoffice box for the reception of mail in the Atlanta postoffice in September 1931, and it was a fair inference that he had not resided here for any considerable length of time and had not become identified with any local business enterprise. He was indicted in July, 1932, and it appeared that in the meantime he had actively espoused the cause of the unemployed, and had inspired a mass demand for an appropriation by the county authorities for their relief. The jury were authorized to find that his chief objective

was to press the cause of the communist party, and that his agitations with reference to local conditions were not the result of any particular interest which he may have had in the local welfare, but were pursued merely as a method of fomenting a state of discontent and unrest as a goodly premise for his party program, or in other words, as a means to an end. The jury, on seeing that his principle mission was to spread the doctrine of the communistic party, could weigh the other circumstances in the light of this fact. In view of it, the documents found in his possession assumed an added significance, and the use to which the defendant may have applied them became an easier question for solution by the jury. Were these not the tools to be used by the defendant in the execution of his mission? Did he remain in Atlanta for about a year without using [fol. 256] them? He told the officers that he was sent to Atlanta as a paid organizer for the communist party, and that the literature was sent to him from the headquarters of this party in New York City. Did he take the means and instruments supplied to him and fail to use them: Was he active or inactive as an agent of his employer? How far did he go in the discharge of the responsible duties assigned to him? The defendant was apparently busy at the time of his arrest, since he had just approached his post-office box and taken out his mail, and was carrying at the time a box containing communistic literature. The number of this box was 339.

The evidence showed that he had distributed circulars "Issued by the Unemployed Committee of Atlanta, P. O. 339", and that he was in fact the author of these circulars. While the circulars here referred to may not have been of any considerable importance within themselves, they showed the defendant's connection with the unemployment committee, and with the other evidence it was a fair conclusion that the name "Unemployment Committee" was a term common in the communist party applicable to its workers or propagandists. It was not shown directly that he ever distributed any literature except two classes of circulars of a more or less harmless character, but the case depended mainly upon circumstantial evidence and must not be measured by the limits of the direct evidence introduced. To say that the defendant did no more than was shown by the direct evidence would deny to the State

all right to the benefit of circumstantial evidence, and this, of course, cannot be done.

[fol. 257] With reference to admissions, the defendant stated to one of the arresting officers that "he was sent here by this communist party as an organizer for them, representing this communist party." He also stated that the material, or literature, found in his possession was "sent to him from headquarters of this communist party in New York." He directed the officers to his room in which a part of the literature was found.

Shortly after his arrest he was taken before Mr. E. A. Stephens, assistant solicitor-general, who testified as follows: "He stated that he came here from Lexington, Kentucky, where he was an employee of some coal mine company, he stated that a man by the name of Doran came there and got him interested in the Communist Party, and that he joined the Nation Communist Party at Lexington, Kentucky, * * * he stated that he was sent to Atlanta to take the position of Organizer for the Communist Party; * * * he stated he was paid $10 a week, some times in cash and some times in money orders. At that time he stated to me that his duties were, as organizer for the Communist Party, to call meetings, educate or disseminate information regarding the party at these meetings, to distribute literature, to secure members for the organization and generally to work up an organization of the Communist Party in Atlanta. * * * He said he had held or attended two meetings, and then later when questioned about where they were held he designated the meeting places of three meetings that he had called and had been held. * * * He did give me the names of persons that he said were members of the organization, said he only have [had] five or six actual members at that time—actual members, as he put it—said the meetings were sometimes in vacant houses and sometimes in private houses * * * he made these statements to me freely and voluntary; I want to state, [fol. 258] further, among the other things he said in talking to me about this quantity of literature here in the suitcase and in the grip, a part of which you will notice has never been taken out of the wrapper—there are several packages like this—in questioning him what this was sent to him for, he stated for distribution at his meetings, the same with reference to many of the books that he had in

these two receptacles there * * * he said that he called the meetings and held them and conducted the meetings; as to whether he said he made any speeches at any of those meetings, I don't know that the word 'speech' was used." The localities of the meetings were given and were shown to be situated in Fulton County.

Other evidence was introduced which showed that the defendant had induced others to become members of the Communistic Party, about twelve in all. What purported to be minutes of three meetings were also found in the defendant's possession. Some of the minutes made reference to "section committees," and from the evidence as a whole the jury were authorized to find that the phrase "section committee," like the term "unemployed committee," was a designation applied to a subordinate division of the communist party. In his statement to the jury he denied none of the testimony to which reference has been made, and made no explanation or statement whatsoever with regard to the literature.

[fol. 259] Among the documents, were nine "Membership Books * * * of the Communist Party of the U. S. A.," containing the names of persons "admitted" to the party in Atlanta. These books also contained what purported to be "extracts from the Statutes of the Communist Party of the U. S. A.," some of which were as follows: "A member of the Party can be every person from the age of eighteen up who accepts the program and statutes of the Communist International and the Communist Party of the U. S. A., who becomes a member of a basic organization of the Party, who is active in this organization, who subordinates himself to all decisions of the Cominterm and of the Party, and regularly pays his membership dues. * * * The Communist Party, like all sections of the Comintern, is built upon the principle of democratic centralization. These principles are: * * * Regular reporting of the Party committees to their constituents. Acceptance and carrying out of the decisions of the higher Party committees by the lower, strict Party discipline, and immediate and exact applications of the decisions of the Executive Committee of the Communist International and of the Central Committee of the Party. * * * The basis of the Party organization is the nucleus (in factories, mines, shops, etc.) which all Party members working in these places must join. The nucleus consists of at least

three members. Newly organized nuclei must be endorsed by the leading committee of the Section in which the shop nuclei are organized. * * *. The strictest Party Discipline is the most solemn duty of all Party members and all Party Organizations. The decisions of the CI and the Party Convention, of the CC and of all leading committees of the Party, must be promptly carried out. Discussion of question over which there have been differences must not continue after the decision has been made." * * * In the same membership books we find the fol-
[fol. 260] lowing question and answer: "What is the Communist Party? The Party is the vanguard of the working class and consists of the best, most class conscious, most active, the most courageous members of that class. It incorporates the whole body of experience of the proletarian struggle, basing itself upon the revolutionary theory of Marxism and representing the general and lasting interests of the whole of the working class. The Party personifies the unity of proletarian principles, of proletarian will and of proletarian revolutionary action. (From the program of the Communist International.) We are the Party of the working class. Consequently, nearly the whole of that class (in time of war and civil war, the whole of that class) should work under the guidance of our Party, should create the closest contacts with out [our] Party. (Lenin.) He who weakens, no matter how little the iron discipline of the Party of the proletariant (especially during the period of dictatorship), effectually helps the bourgeoisie against the proletariat. (Lenin.)"

The authenticity of the literature was effectually admitted by the defendant, and thus no reasonable question can be raised in this case as to the reality of its apparent source, whether it purports to be an expression from the New York headquarters or from the main party organization, wherever located.

The defendant himself was admittedly a member of the party, and he showed that he was connected with a "party committee:" Did he accept its discipline, program, and statutes, and endeavor to execute them as other members were required to do? These were questions to be considered by the jury, and we cannot say that they should have been answered favorably to the accused. When he solicited members and thus pledged them to the party
[fol. 261] program, what, indeed, was contemplated? Was

it an "attempt to induce others to join in combined resistance to the lawful authority of the State?" This was a question to be answered by the jury in the light of that program, and here let us notice some of the additional literature bearing upon the motive and intent of the party organization, and which the jury had before them for their study and consideration.

One of the documents was a booklet entitled "The Communist Position on Negro Question." On the outside cover was a map of the United States, under which was the following: "Self Determination for the Black Belt." The map had a dark belt across it, beginning with a portion of Arkansas and Louisiana, and extending generally eastward through the States of Mississippi, Alabama, Florida, and Georgia, and thence up the coast through several States. The belt included about two thirds of the State of Georgia, mostly in the central section, from west to east. On page 28 of the pamphlet appeared the following: "In the South, the fight must be fearlessly developed against the thievery and robbery of the Southern capitalists and landlords; against their whole system of enslaving the Negroes based on Jim-Crowism and lynch terror. We must fight there not mererly against inequality, but against the whole system by which this inequality is enforced. In the first place, our demand is that the land of the Southern white landlords for years tilled by the Negro tenant farmers, be confiscated and turned over to the Negroes. This is the only way to insure economic and social equality for the tenant farmers. Secondly, we propose to break up the present artificial State boundaries established for the convenience of the white master class, and to establish the State unity of the territory known as the "Black Belt," where the Negroes constitute the overwhelming majority of the population. Thirdly, in this territory, we [fol. 262] demand that the Negroes be given the complete right of self-determination; the right to set up their own government in this territory and the right to separate, if they wish, from the United States. Around these demands for the Negroes, as I have outlined them here—with the revolutionary white workers in the very fore-front of the struggle—the unity of white workers, small farmers and the Negro masses must be established. Not Promises: But Action. But the Negroes have listened to many promises.

Every political faker has promised equality and freedom. The white workers can win the confidence of the Negro masses, not by promises, But By Action."

The matter last quoted appeared to be an extract from a speech nominating a candidate for vice-president of the United States on the communist ticket for 1932; but, even so, it appeared in a pamphlet entitled "The Communist Position on the Negro Question," and came to the defendant with the implied, if not express, approval of the party headquarters in New York. In any view, it illustrated the program in Georgia, and shed light upon the purpose and intent of the defendant in soliciting members, and in otherwise executing his mission as the party agent.

This pamphlet which carried the map of the "Black Belt," also contained the following: "Resolutions of the Communist International on the Negro Question in the United States." "Resolution of Communist International, October, 1930-1. * * * The struggle of the Communists for the equal rights of the Negroes applies to all Negroes, in the North as well as in the South. The struggle for this slogan embraces all or almost all of the important special interests of the Negroes in the North, but not in the South, where the main Communist slogan must be: The Right of Self-Determination of the Negroes in the Black Belt. These two slogans, however, are most [fol. 263] closely connected. The Negroes in the North are very much interested in winning the right of self-determination of the Negro population of the Black Belt and can thereby hope for strong support for the establishment of true equality of the Negroes in the North. In the South the Negroes are suffering no less, but still more than in the North from the glaring lack of all equality; for the most part the struggle for their most urgent partial demands in the Black Belt is nothing more than the struggle for their equal rights, and only the fulfillment of their main slogan, the right of self-determination in the Black Belt, can assure them of true equality. * * * It is the special duty of the revolutionary Negro Workers to carry on tireless activity among the Negro working masses to free them of their distrust of the white proletariat and draw them into the common front of the revolutionary class struggle against the bourgeoisie. * * * The slogan of the right of self-determination occupies the central place

in the liberation struggle of the Negro population in the Black Belt against the yoke of American imperialism. But this slogan, as we see it, must be carried out only in connection with two other basic demands. Thus, Black Belt, namely, the following: (a) Confiscation of the Landed Property of the White Landowners and Capitalists for the Benefit of the Negro Farmers. The landed property in the hands of the white American exploiters constitutes the most important material basis of the entire system of national oppression and serfdom of the Negroes in the Black Belt. More than three-quarters of all Negro farmers here are bound in actual serfdom to the farms and plantations of the white exploiters by the feudal system of 'share-cropping.' Only on paper and not in practice are [fol. 264] they freed from the yoke of their former slavery. The same holds completely true for the great mass of black contract laborers. Here the contract is only the capitalist expression of the chains of the old slavery, which even today are not infrequently applied in their natural iron form on the roads of the Black Belt (chain-gang work). These are the main forms of present Negro slavery in the Black Belt, and no breaking of the chains of this slavery is possible without confiscating all the landed property of the white masters. Without this revolutionary measure, without the ag-arian revolution, the right of self-determination of the Negro population would be only a Utopia or, at best, would remain only in paper without changing in any way the actual enslavement. (b) Establishment of the State Unity of the Black Belt. At the present time this Negro Zone—precisely for the purpose of facilitating oppression—is artificially split up and divided into a number of various States which include distant localities having a majority of white population. If the right of self-determination of the Negroes is to be put into force, it is necessary wherever possible to bring together into one governmental unit all districts of the South where the majority of the settled population consist of Negroes. Within the limits of this State there will of course remain a fairly significant white minority which must submit to the right of self-determination of the Negro majority. There is no other possible way of carrying out in a democratic manner the right of self-determination of the Negroes. Every plan regarding the establishment of the Negro state with an

exclusively Negro population in America (and of course still more exporting it to Africa) is nothing but an unreal and reactionary caricature of the fulfillment of the right [fol. 265] of self-determination of the Negroes, and every attempt to isolate and transport the Negroes would have the most damaging effect upon their interests. Above all, it would violate the right of the Negro farmers in the Black Belt not only to their present residences and their land, but also to the land owned by the white landlords and cultivated by Negro labor. (c) Right of Self-Determination. This means complete and unlimited right of the Negro majority to exercise governmental authority in the entire territory of the Black Belt, as well as to decide upon the relations between their territory and other nations, particularly the United States. It would not be right of self-determination in our sense of the word if the Negroes in the Black Belt had the right of self-determination only in cases which concerned Exclusively the Negroes and did not affect the whites, because the most important cases arising here are bound to affect the whites as well as Negroes. First of all, true right to self-determination means that the Negro majority and not the white minority in the entire territory of the administratively united Black Belt exercises the right of administering governmental, legislative, and judicial authority. At the present time all this power is concentrated in the hands of the white bourgeoisie landlords. It is they who appoint all officials, it is they who dispose of public property, it is they who determine the taxes, it is they who govern and make the laws. Therefore, the Overthrow of this Class Rule in the Black Belt is unconditionally necessary in the struggle for the Negroes' right to self-determination. This, however, means at the same time the overthrow of the yoke of American imperialism in the Black Belt on which the forces of the local white bourgeoisie depend. Only in this way, only if the Negro [fol. 266] population of the Black Belt wins its freedom from American imperialism even to the point of deciding Itself the relations between its country and other governments, especially the United States, will it win real and complete self-determination. One should demand from the beginning that no armed forces of American imperialism should remain on the territory of the Black Belt. • • • As stated in the letter of the Political Secretariat of the

E. C. C. I. of March 16, 1930, the Communists must unreservedly carry on the struggle for the self-determination of the Negro population in the Black Belt in accordance with what has been set forth above. It is incorrect to say that the Communists are only to carry on propaganda or agitation for the right of self-determination, but not to develop any activity to bring this about. No, it is of the utmost importance for the Communist Party to reject any such limitation of its struggle for this slogan. Even if the situation does not yet warrant the raising of the question of uprising, one should not limit oneself at present to propaganda for the 'Right of Self-Determination' but should organize mass actions such as demonstrations, strikes, tax boycott movements, etc. • • • It would be a mistake to imagine that the right of self-determination slogan is a truly revolutionary slogan only in connection with the demand for complete separation. The question of power is decided not only through the demand of separation, but just as much through the demand of the right to decide the separation question and self-determination in general. A direct question of power is also the demand of confiscation of the land of the white exploiters in the South, as well as the demand of the Negroes that the entire Black Belt be amalgamated into a State unit. Hereby every single fundamental demand of the liberation struggle of the Negroes in the Black Belt is such that if once [fol. 267] thoroughly understood by the Negro masses and adopted as their slogan it will lead them into the struggle for the overthrow of the power of the ruling bourgeoisie, which is impossible without such revolutionary struggle. One cannot deny that it is just possible for the Negro population of the Black Belt to win the right to self-determination during capitalism; but it is perfectly clear and indubitable that this is possible only through successful Revolutionary Struggle for power against the American bourgeoisie, through wresting the negroes' fight of self-determination from American Imperialism. Thus, the slogan of right to self-determination is a real slogan of National Rebellion which to be considered as such, need not be supplemented by proclaiming struggle for the complete separation of the Negro zone, at least not at present. • • • It is particularly incumbent on Negro Communists to criticize consistently the half-heartedness and hesitations

of the petty-bourgeois national-revolutionary Negro leaders in the liberation struggle of the Black Belt, exposing them before, the masses * * * Simultaneously, Negro communists must carry on among the negro masses an energetic struggle against nationalist moods directed indiscriminately against all whites, workers as well as capitalists, Communists as well as imperialists. Their constant call to the Negro masses must be: Revolutionary Struggle Against the Ruling White Bourgeoisie, Through a Fighting Alliance With the Revolutionary White Proletariat."

The booklet from which the foregoing statements are quoted contained a foreword as follows: "The documents presented in this pamphlet are the result of the very best and most careful thought, study and experience of our party. The correct line on our Party has been hammered out in years of bitter struggle—struggle with the enemies of Bolshevism. But in the furious struggle against our [fol. 268] enemies, and against the influence of these enemies upon our own ranks; with the indispensable guidance of the Communist International—our Party has hammered out its Bolshevik line on the Negro question."

Another document found in the defendant's possession was a book entitled "Communism and Christianism," and containing the following statements: "As the machinery of capitalist government, including the armed forces of the nation, conserves the monopoly by the capitalist class of the wealth taken from the workers, the working class must organize consciously and politically for acquiring the powers of government, national and local, in order that this machinery, including these forces, may be converted from an instrument of oppression into the agent of emancipation and the overthrow of privilege, aristocratic and plutocratic. The trouble with every reformitory socialism of modern times is, that it undertakes the impossibility of changing the fruit of the capitalist state into that of the communistic one, without changing the political organism; but to do that is as impossible as to gather grapes from thorns or figs from thistles. Hence an uprooting and replanting are necessary (a revolution not a reformation) which will give the world a new tree of state. Capitalism no longer grows the fruits (foods, clothes and houses) which are necessary to the sustenance of all the world. Hence

it must be dug up by the roots in order that a tree which is so organized that it will bear these necessities for the whole world may be planted in its place. The people in Russia have accomplished this uprooting and replanting (this revolution) in the case of their state, and those of every nation are destined to do the same in one way or another, each according to its historical and economical [fol. 269] development, some with much violence, most, I hope with but little."

The evidence also included a document entitled "An Appeal to Southern Young Workers." Following are some of the statements contained in this document: "The Young Communist League is the champion not only of the young white workers but especially of the doubly oppressed Negro young workers. The Young Communist League fights against the whole system of race discrimination and stands for full racial, political, economic and social equality for all workers. * * * The Young Communist League is a section of the Young Communist International, the revolutionary leader of the young workers the world over and accepts the guidance of the Communist Party of America. The Young Communist League fights for: * * * Full Political, Social and Racial Equality for the Negro Workers * * * Smash the National Guard, the C. M. T. C. and R. O. T. C."

Still another document was one entitled "Party Organizer" and containing a number of articles on the Communistic party, on what it advocates, and the manner of organizing workers.

In his statement to the jury the defendant said in part:

"We know the system we are living under is on the verge of collapse; no matter what system we are living under, it has developed to its highest point and comes back—for instance, you can take a balloon and get so much air in it, and when you get too much it bursts; so with the system we are living under—of course, I don't know whether that is insurrection or not, but the question, it has developed to its highest point."

The defendant here apparently expressed the view that a crisis was impending. Did this statement not indicate a belief that the conditions were opportune for a revolution

[fol. 270] or insurrection and that now or soon would be a seasonable time to strike? We repeat that the case does not turn alone upon the direct evidence that circulars advocating unemployment relief were distributed. It must not be overlooked that the defendant was an organizer and induced a number of persons to become members of the communist party, the purpose and intent of which are thoroughly illustrated by the documentary evidence from which we have quoted. The establishment of the "Black Belt" by peaceful and through lawful processes could not have been reasonably anticipated. It called for "breaking up State lines" with even the right of secession from the present national government. The literature fairly teems with such expressions as "confiscation," "revolution," "rebellion," and "violence," even distinguishing a "reformation" and advocating an "uprooting" in its stead. The jury were amply authorized to infer that violence was intended and that the defendant did attempt to induce others to combine in such resistance to the lawful authority of the State.

In Carr v. State, 176 Ga. 55 (2), 63, this court said that "A combination of persons working together in a campaign with the intent and purpose to overthrow the present government of the United States or the States of the Federal Union, by the establishment of a proletarian dictatorship through resistance to the Federal Government and by the smashing of the National Guard, can not be considered as an inoffensive, peaceful aggregation of citizens merely advising that course with the anticipation that the present government will quietly lay down its authority and embrace the principles and form of the proletarian dictatorship of Soviet Russia." This statement was in reference to the use of literature containing some of the expressions which [fol. 271] are found in this record and quoted in the present opinion. In Gitlow v. People of New York, 268 U. S. 652 (45 Sup. Ct. 625, 69 L. Ed. 1138), the Supreme Court of the United States had for consideration a "Manifesto," which in tone and substance was similar to the documentary evidence in the instant case, and not stronger in its tendency to insurrection. In Carr v. State, supra, Mr. Justice Gilbert, speaking for this court, quoted at length from the decision in the Gitlow case. We now refer to the quotations there made as illustrating the opinion of the highest court on the nature and purport of such literature. Some

of the language is so pertinent that we also take the liberty of quoting again, in part, as follows: "The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government. It concludes with a call to action in these words: 'The proletarian revolution and the Communist reconstruction of society—the struggle for these—is now indispensable. * * * The Communist International calls the proletariat of the world to the final struggle!' This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement. The means advocated for bringing about the destruction of organized parlimentary government, namely, mass industrial revolts usurping the functions of municipal government, political mass strikes directed against the parlimentary State, and revolutionary mass action for its final destruction, necessarily imply the [fol. 272] use of force and violence, and in their essential nature are inherently unlawful in a constitutional government of law and order. That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence, and unlawful means, but action to that end, *is clear.* * * * *That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear.* Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial because the effect of a given utterance can not be accurately forseen. The State can not reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It can not be said that the State is acting arbitrarily

or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It can not reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency. In People v. Lloyd [304 Ill. 23, 34, 136 N. E. 505] it was aptly said: 'Manifestly, the legislature has authority to forbid the [fol. 273] advocacy of a doctrine designed and intended to overthrow the government, without waiting until there is a present and imminent danger of the success of the plan advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law.' " See also Whitney v. California, 274 U. S. 357 (47 Sup. Ct. 641, 71 L. Ed. 1095), and cit.

The evidence authorized the verdict, and the court did not err in refusing a new trial.

Judgment affirmed. All the Justices concur, except Russell, C. J., absent on account of illness.

[fol. 274] IN SUPREME COURT OF GEORGIA

JUDGMENT—May 24, 1934

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

ANGELO HERNDON

v.

THE STATE

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur, except Russell, C. J., absent on account of illness.

[fol. 275] IN SUPREME COURT OF GEORGIA

[Title omitted]

NOTICE OF PETITION FOR CERTIORARI—Filed June 2, 1934

To the Supreme Court of the State of Georgia:

Now comes Angelo Herndon, appellant in the above-stated case, and being dissatisfied with the decisions of the Supreme Court of The State of Georgia therein, gives this notice within ten days of the judgment of the Supreme Court of Georgia in said matter, that he intends to apply to the Supreme Court of the United States for a writ of certiorari, to correct the alleged errors, all as provided by the rules of said Court.

Angelo Herndon, Appellant, by B. J. Davis, Jr. and John H. Geer, Attorneys at Law, Atlanta, Ga.

[File endorsement omitted.]

[fol. 276] IN SUPREME COURT OF GEORGIA

[Title omitted]

SUPERSEDEAS ORDER

Notice of intent on to certiorari the above-stated case to the Supreme Court of the United States having been given, it is hereby ordered that this notice be allowed to operate as a supersedeas of the judgment in this case for a period of fifty (50) days, with the right, however, that should there for any reason be delay in making application for the writ of certiorari to the Supreme Court of the United States as provided by law, that the applicant have leave to make to this court application for additional time.

Upon motion of counsel for the plaintiff in error it is further ordered that there shall be prepared, certified, and transmitted by the clerk of the Supreme Court of Georgia to the Supreme Court of the United States at Washington, D. C., a copy of the record, proceedings, papers, opinion, and judgment in the Supreme Court of Georgia, in the manner and form provided by law, so that said records shall be in said court within fifty (50) days from this date,

to the end that said court may inspect the same and do in reference thereto whatever, according to law, should be done. Let this order be entered on the Minutes. This June 14th, 1934.

Richard B. Russell, Chief Justice, Supreme Court of the State of Georgia.

[fol. 277] IN SUPREME COURT OF GEORGIA

[Title omitted]

ORDER AS TO TRANSCRIPT OF RECORD

Upon application of counsel for the plaintiff in error, the order in this case heretofore granted on June 14, 1934, is modified so that in lieu of the following language, to-wit: "that there shall be prepared, certified, and transmitted by the clerk of the Supreme Court of Georgia to the Supreme Court of the United States at Washington, D. C., a copy of the record, proceedings, papers, opinion, and judgment in the Supreme Court of Georgia," it is ordered as requested by counsel for the plaintiff in error, that the certified copy of the "record, proceedings, papers, opinion, and judgment in the Supreme Court of Georgia," be delivered to counsel for the plaintiff in error for such further action in regard to said record as may be taken by said counsel in their discretion. This July 5, 1934.

Richard B. Russell, Chief Justice, Supreme Court of the State of Georgia.

[fol. 278] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 279] IN SUPREME COURT OF GEORGIA

[Title omitted]

ORDER FURTHER STAYING EXECUTION OF JUDGMENT—Filed Aug. 2, 1934

Upon the affidavit of Carol King, verified the 27th day of July, 1934, and upon the order of this Court under date

of the 14th day of June, 1934, staying the order of execution in this case for a period of fifty days,

Upon motion of counsel for the plaintiff in error, it is

Ordered that the execution of the judgment in this case be stayed for a further period of twenty-one days or until to and including the 24th day of August, 1934.

Let this order be entered on the minutes.

This 31st day of July, 1934.

Richard B. Russell, Chief Justice, Supreme Court of the State of Georgia.

[File endorsement omitted.]

[fol. 280] IN SUPREME COURT OF GEORGIA

[Title omitted]

PETITION FOR LEAVE TO FILE MOTION FOR REHEARING—Filed Aug. 20, 1934

To the Supreme Court of Georgia:

The petition of Angelo Herndon, the plaintiff in error in the above entitled cause, respectfully shows unto this Honorable Court:

First: That prior to May 24, 1934, your petitioner was indicted for an alleged violation of Section 56 of the Penal Code of Georgia, which reads as follows:

"Any attempt by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the state shall constitute an attempt to incite insurrection."

Second: That your petitioner was thereafter tried upon said indictment and conviction, and your petitioner was thereupon adjudged guilty as charged in the said indictment by the Superior Court of Fulton County, Criminal Division.

Third: That following the verdict of guilty returned by the jury whom your petitioner was tried, your petitioner moved for a new trial (R. 16), and your petitioner's motion for a new trial having been overruled, your petitioner duly excepted to the judgment of the trial court overruling your

petitioner's said motion and assigned the denial thereof as error on his appeal to this Court.

Fourth: That on May 24, 1934, this Court rendered a judgment herein affirming the judgment of the Court below and on the same day handed down an opinion stating the reasons which led this Court to affirm the said judgment.

Fifth: That Rule 40 of the Rules of this Court provides as follows:

[fol. 281] "Motion for rehearing when and how made.

No motion for a rehearing will be considered by this court unless the same is filed in the office of the clerk thereof in duplicate (the original and a carbon copy being sufficient), during the term at which the judgment sought to be reviewed was rendered, and before the remittur in the case to which said motion relates has been forwarded to the clerk of the trial court. A rehearing will be granted, on motion of the losing party, only when it appears that the court has overlooked a material fact in the record, a statute, or a decision which is controlling as authority and which would require a different judgment from that rendered. No motion for a rehearing will be entertained which does not expressly point out what material fact in the record, or controlling statute or decision, has been overlooked by the court. There shall be attached to the motion a certificate of counsel that upon careful examination of the opinion of the court he believes such a fact, statute or decision, has been overlooked. The motion, when filed, shall show that a copy thereof has been served on opposing counsel, who may thereupon file a brief on the questions raised.

"If movant should desire to furnish additional copies of the motion or briefs of law for each of the Justices the same must be filed with the clerk of the Supreme Court for delivery to the Justices. Such copies of the motion and brief should not be mailed or sent directly to the Justices.

"In so far as practicable, the provisions of this rule shall apply to cases certified to this Court by the Court of Appeals."

Sixth: That pursuant to Rule 40, on the 9th day of August, 1934, your petitioner served a copy of a section for [fol. 282] a rehearing upon the Solicitor General of Fulton

County and attempted to file two copies thereof with the clerk of this Court.

Seventh: That the judgment rendered by this Court affirming the judgment of the court below was rendered at the March, 1934, Term of this Court; that that term had not been ended on August 9, 1934, nor has it ended at the date of this petition; and that on that date the remittur in this case had not been forwarded by the clerk of this Court to the clerk of the trial court, nor has the remittur been so forwarded at the date of this petition.

Eighth: That your petitioner's said motion was made in the manner and within the time prescribed by Rule 40 but that, as your petitioner is inferred and believes, the clerk of this Court refused to file the said motion papers unless and until ordered to do so by the Chief Justice of this Court.

Ninth: Thereupon counsel for your petitioner applied informally on August 9, 1934, to the Chief Justice of this Court for an order directing the Clerk of this Court to accept and file the said motion papers but that the Chief Justice refused to issue such an order on the grounds, as your petitioner is advised and believes, that under the Rules of this Court a motion for a rehearing must be filed within ten days from the date of the judgment of this Court and that the remittur in this case would long since have been transmitted to the clerk of the trial court if it had not been for the *section* of your petitioner herein referred to and that your petitioner cannot now take advantage of the delay in transmitting the remittur to the court below since the delay was caused by your petitioner; and upon the further ground that upon the rendition of the judgment of this Court your petitioner had two available remedies, one of which was to move this Court for a rehearing, and the other of which was to apply to the Supreme Court of the United States for a writ of certiorari, and that your petitioner having, as will hereinafter appear, notified this Court that he intended to apply for a petition for certiorari, waived his right to move this Court for a rehearing.

Tenth: That on June 2, 1934, your petitioner filed in this Court a document entitled "Notice of intention to certiorari [fol. 283] and supersedeas," a copy of which is hereto an-

nexed as Exhibit A, and that on June 14, 1934, the Chief Justice of this Court granted an order upon the said notice directing that the said notice be allowed to operate as a supersedeas of the judgment in this case for a period of fifty days, a copy of the said order being hereto annexed as Exhibit B.

Eleventh: That Rule 41 of the Rules of this Court reads as follows:

"Remittur. The remittur from this court shall contain the judgment of the court. It shall be duly certified by the clerk, and unless otherwise ordered, or unless a motion for a rehearing has been previously filed under the foregoing rule, shall be transmitted to the clerk of the trial court as soon as practicable after the expiration of ten days from the date of the judgment. The certificate to every remittur shall state the amount of costs taxed in the case, and by whom paid."

Twelfth: That your petitioner is advised that if the Rules of this court are construed so as to require a motion for a rehearing to be filed within ten days of the date of the rendition of the judgment, such a construction is so entirely at variance with the plain unambiguous wording of Rule 40, that your petitioner was misled by the Rules of this Court and that under all the circumstances justice demands that this Court should apply Rule 40 as written to this case.

Thirteenth: That your petitioner is also advised that if the Rules of this Court have not heretofore been construed as requiring a motion for a rehearing to be made within ten days of the rendition of the judgment, so to construe the Rules of this Court at this time would be a new and novel construction which would itself operate to deprive your petitioner of due process of law under the Fourteenth Amendment to the Constitution of the United States if the effect thereof will be to prevent your petitioner from having the constitutionality of the said statute as construed and applied by this Court passed upon by the Supreme Court of the United States.

[fol. 284] Fourteenth: That your petitioner is also advised that under the decisions of this Court and that as a matter of general law, however the Rules of this Court are

construed in the respect above mentioned, they do not constitute a limitation upon the jurisdiction and power of this Court to entertain a motion for a rehearing that in prior cases, for example, Hawk v. Western and Atlantic Railway Co., 146 Ga. 373, this Court has not set aside its judgments on its own motion although the remittur in those cases had actually been transmittted to the trial courts; that this Court has held that it has full control of its judgments and the power to set them aside or modify them at any time before the end of the term at which they were rendered provided the remitturs have not theretofore been filed in the courts below; such power, for this Court to fail to exercise it under the circumstances of this case would itself operate to deprive your petitioner of the due process of law which is guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, to the extent that the failure of this Court to exercise its admitted power will deprive your petitioner of the opportunity of having the question of the constitutionality of the said statute as applied by this Court passed upon by the Supreme Court of the United States.

Fifteenth: That pursuant to Rule 40, on the 16th day of August, 1934, your petitioner served upon the Solicitor General of Fulton County a copy of an amended motion for a rehearing, a copy of the said amended — being hereto annexed as Exhibit C.

Sixteenth: That on the 16th day of August, 1934, your petitioner applied informally to the Chief Justice of this Court for an order directing the Clerk of this Court to accept and file the said motion papers, but that the Chief Justice declined to issue such an order on the ground, as your petitioner is advised and believes, that the said order should not issue until the rules of this Court had been construed by a banc of some or all of the Justices therefor.

Seventeenth: That, as your petitioner is advised and believes, a banc of this Court is to convene on the 20th day of August, 1934, for the purpose of considering whether any rule of this Court should be construed in such a manner as to prevent your petitioner from calling to the attention [fol. 285] of the Court at this time the constitutional ques-

tion raised by the judgment of this Court as more fully appears from the amended motion for a rehearing which is above referred to and a copy of which is hereunto annexed.

Eighteenth: That the time in which your petitioner may file in the Supreme Court of the United States an appeal from the judgment of this Court, will expire on the 24th day of August, 1934, unless your petitioner is permitted by this Court to file his motion for a rehearing with the Clerk of this Court.

Nineteenth: That your petitioner is prepared, through counsel, to appear before this Court, if it so desires, in support of his petition for an order directing the Clerk of this Court to receive and file your petitioner's motion for a rehearing.

Wherefore, your petitioner respectfully prays:

That this Court forthwith issue an order directing the clerk of this court to receive and file your petitioner's motion for a rehearing.

Dated August 17, 1934.

Respectfully submitted, John H. Geer, Attorney for Petitioner.

Service of this petition and receipt of a copy thereof are hereby acknowledged this — day of August, 1934.

John A. Boykin, Solicitor General of the Atlanta Circuit.

[fol. 286] Exhibit "A" to petition omitted. Printed side page 275 ante.

[fol. 287] Exhibit "B" to petition omitted. Printed side page 276 ante.

[fol. 288] EXHIBIT "C" TO PETITION

IN SUPREME COURT OF GEORGIA

ANGELO HERNDON, Plaintiff in Error,

against

THE STATE OF GEORGIA, Defendant in Error

MOTION FOR REHEARING—Filed Aug. 20, 1934

To the Honorable The Supreme Court of Georgia:

Now comes Angelo Herndon, the plaintiff in error in the above entitled cause, and pursuant to Rule 40 of the Court respectfully moves the Court to rehear and reconsider his appeal herein upon the ground that in affirming the judgment of guilty rendered against the plaintiff in error by the Superior Court of Fulton County, Criminal Division, this Court failed to pass upon and decide the question, which was material to the determination of the appeal of the plaintiff in error, whether Section 56 of the Penal Code of Georgia as applied by this Court to the facts of this case, violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

And in support of his said motion for a rehearing and a reconsideration of this cause, the plaintiff in error respectfully shows unto the Court:

Upon the trial of this case in the court below, the trial judge charged the jury (R. 195):

"• • • That advocacy, however reprehensible morally, is not sufficient to convict the defendant where there is no evidence to indicate that the advocacy would be acted upon immediately. In order to convict the defendant, gentlemen, it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or advocated."

And also (R. 195) "that an attempt to commit an act which [fol. 289] is, in fact, a crime, is not complete unless the alleged crime is dangerously near completion."

Thus, as the trial judge construed the statute in question, it does not make criminal every attempt, by persuasion or otherwise, to induce others to join in combined resistance

to the authority of the State, but only such attempts as are intended to bring about such resistance immediately or as are likely under all the circumstances to bring about such resistance immediately.

The jury having returned a verdict of guilty, the plaintiff in error moved for a new trial on the ground that the verdict was contrary to law and the evidence (R. 16), and, his motion for a new trial having been denied, he duly excepted (R. 2).

In construing the statute for the purpose of determining whether the evidence was sufficient to support the verdict, this Court said in its opinion (174 S. E. 609):

"It is immaterial whether the authority of the State was in danger of being subverted or that an insurrection actually occurred or was impending."

And this court also said (174 S. E. 610):

"Force must have been contemplated, but, as said above, the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but it would be sufficient that he intended it to happen at any time, as a result of his influence, by those whom he sought to incite. It was the intention of this law to arrest at its incipiency any effort to overthrow the state government, where it takes the form of an actual attempt to incite others to insurrection."

Thus, as this Court construed the statute, every attempt to pursuade others to join in combined resistance to the [fol. 290] authority of the State is criminal, provided only that the person making the attempt intended forcible resistance to occur at some time, however remote, as the result of his persuasion, however unlikely that his attempt would succeed. It is obvious that this Court's construction of the statute is radically different from that of the trial judge. That means that the statute as applied by the trial court was a very different statute from the statute as applied by this Court.

Under the trial judge's construction, the evidence was insufficient to support the verdict of guilty unless it was proved either that the plaintiff in error attempted to per-

suade others to engage in immediate forcible resistance to the authority of the State or that the plaintiff in error should have foreseen under the circumstances that forcible resistance was likely to result immediately. Under this Court's construction of the statute, the evidence was sufficient to support the verdict if it was proved that the plaintiff in error intended that forcible resistance to the State's authority should occur at any time whatever as the result of his persuasion, however unlikely that result under the circumstances.

The rigid and narrow construction of the statute by this Court necessarily raises the question whether the statute as construed and applied by this Court to the facts of this case was repugnant to the due process clause of the Fourteenth Amendment to the Federal Constitution. This question was obviously material to a decision of the appeal of the plaintiff in error because if the statute as construed by this Court is unconstitutional the judgment of guilty rendered by the Court below could not be lawfully affirmed.

Moreover, no procedural obstacle is present to prevent consideration and determination of the constitutionality of the statute in question as construed and applied by this Court. That question originated in this Court, and the plaintiff in error was not required to anticipate, nor could he have anticipated, while the case was in the trial court, that this Court would construe and apply the statute differently and even more strictly than it had been construed and applied in the trial court. Neither by an exception to the trial judge's charge, on the ground that the statute as [fol. 291] construed by the trial judge was unconstitutional, nor by any conceivable assignment of error could the plaintiff in error have raised in the trial court the question of the constitutionality of the statute as it was subsequently construed and applied by this Court.

That question was therefore not only material to a decision of the appeal of the plaintiff in error but it is properly before this Court, since it originated here and is now called to the attention of this Court by the plaintiff in error at the first opportunity for so doing. The plaintiff in error respectfully submits that under the decisions of the Supreme Court of the United States in Schenck v. U. S., 249 U. S. 47, 52, Fiske v. Kansas, 274 U. S. 380, and Stromberg v. California, 283 U. S. 359, the statute as construed and ap-

plied by this Court is repugnant to the due process clause of the Fourteenth Amendment. This constitutional question was first presented by the decision of this Court and should be considered by it before making a final determination of the appeal of the plaintiff in error.

The plaintiff in error respectfully submits that this Court should grant a rehearing of the appeal so that the Court may now consider and decide the question whether the statute as construed and applied by it is constitutional.

Wherefore, the plaintiff in error prays that his motion for a rehearing and reconsideration of his appeal herein be granted, and that upon a rehearing and reconsideration thereof the judgment of affirmance rendered herein by this Court on May 24, 1934, and the opinion of this Court upon which the said judgment was based, be vacated and set aside, and that this Court render judgment reversing the judgment of the Superior Court of Fulton County.

Dated August 16, 1934.

Respectfully submitted, John H. Geer, Attorney for Plaintiff in Error, 250 Auburn Avenue, N. E., Atlanta, Ga.

[fol. 292] I am one of the attorneys for the plaintiff in error herein and participated in the trial and appeal of his case and have read and am familiar with the record thereof.

I hereby certify that upon careful examination of the opinion of the Supreme Court in the above entitled case I believe that the Court overlooked and failed to decide the question whether section 56 of the Georgia Penal Code as applied to the facts of the above entitled case violates the due process clause of the Fourteenth Amendment to the Constitution of the United States; and I further certify that I believe that certain controlling decisions of the Supreme Court of the United States require the decision that the above statute, as construed and applied by the Court in the above entitled case, is invalid.

John H. Geer, Attorney for Plaintiff in Error.

[File endorsement omitted.]

[fols. 293 & 294] IN SUPREME COURT OF GEORGIA

[Title omitted]

ACKNOWLEDGMENT OF SERVICE—Filed Aug. 20, 1934

Due and legal service of notice of the date of filing of the petition for rehearing, together with a copy of the petition and the brief in support thereof, are hereby acknowledged.

This 16th day of August, 1934.

John A. Boykin, John H. Hudson, Solicitor-General, Fulton County, Georgia. J. Walter LeCraw, for the State.

[File endorsement omitted]

[fol. 295] IN SUPREME COURT OF GEORGIA

No. 9871

Decided May 24, 1934

HERNDON

v.

THE STATE

By the Court:

OPINION ON MOTION FOR REHEARING

1. The original decision as reported in 178 Ga. 832 (174 S. E. 597), explained.

2. This court will not pass upon the constitutionality of an act of the General Assembly unless it clearly appears in the record that the point was directly and properly made in the court below and distinctly passed on by the trial judge.

3. There is no merit in the motion for rehearing.

Bell, J. Angelo Herndon was convicted of the offense of an attempt to incite an insurrection as defined in Penal Code, § 56, and was given a sentence in accordance with

section 57. His motion for a new trial was overruled and the judgment was affirmed by this Court in a decision reported in 178 Ga. 832.

No attack upon the constitutionality of the statute under which he was convicted was made in the court below, and none was attempted in this court prior to the decision referred to and the judgment based thereon. But, during the same term in which judgment of affirmance was rendered and before the remittitur was forwarded to the clerk of the trial court, the defendant (plaintiff in error) filed a motion for a rehearing, suggesting some constitutional [fol. 296] considerations, and being in its material parts as follows:

Upon the trial of this case in the court below, the trial judge charged the jury (R. 195): '* * * That advocacy, however reprehensible morally, is not sufficient to convict the defendant where there is no evidence to indicate that the advocacy would be acted upon immediately. In order to convict the defendant, gentlemen, it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or advocated.' And also (R. 195) 'that an attempt to commit an act which is, in fact, a crime, is not complete unless the alleged crime is dangerously near completion.' Thus, as the trial judge construed the statute in question, it does not make criminal every attempt, by persuasion or otherwise, to induce others to join in combined resistance to the authority of the State, but only such attempts as are intended to bring about such resistance immediately or as are likely under all the circumstances to bring about such resistance immediately. The jury having returned a verdict of guilty, the plaintiff in error moved for a new trial on the ground that the verdict was contrary to law and the evidence (R. 16), and, his motion for a new trial having been denied, he duly excepted (R. 2). In construing the statute for the purpose of determining whether the evidence was sufficient to support the verdict, this court said in its opinion (174 S. E. 609): 'It is immaterial whether the authority of the State was in danger of being subverted or that an insurrection actually occurred or was impending.' And this Court also said (174 S. E. 610): 'Force must have been contemplated, but, as said above, the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor

would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but it would be sufficient [fol. 297] that he intended it to happen at any time, as a result of his influence, by those whom he sought to incite. It was the intention of this law to arrest at its incipiency any effort to overthrow the state government, where it takes the form of an actual attempt to incite others to insurrection.' Thus, as this court construed the statute, every attempt to persuade others to join in combined resistance to the authority of the State is criminal, provided only that the person making the attempt intended forcible resistance to occur at some time, however remote, as the result of his persuasion, however unlikely that his attempt would succeed. It is obvious that this court's construction of the statute is radically different from that of the trial judge. That means that the statute as applied by the trial court was a very different statute from the statute as applied by this court.

"Under the trial judge's construction, the evidence was insufficient to support the verdict of guilty unless it was proved either that the plaintiff in error attempted to persuade others to engage in *immediate* forcible resistance to the authority of the State or that the plaintiff in error should have foreseen under the circumstances that forcible resistance was likely to result *immediately*. Under this court's construction of the statute, the evidence was sufficient to support the verdict if it was proved that the plaintiff in error intended that forcible resistance to the State's authority should occur at any time whatever as the result of his persuasion, however unlikely that result under the circumstances. The rigid and narrow construction of the statute by this court necessarily raises the question whether the statute as construed and applied *by this court* to the facts of this case was repugnant to the due process clause [fol. 298] of the fourteenth amendment to the Federal constitution. This question was obviously material to a decision of the appeal of the plaintiff in error because if the statute as construed by this court is unconstitutional the judgment of guilty rendered by the court below could not be lawfully affirmed. Moreover, no procedural obstacle is present to prevent consideration and determination of the constitutionality of the statute in question as construed

and applied *by this court*. That question originated in this court, and the plaintiff in error was not required to anticipate, nor could he have anticipated, while the case was in the trial court, that this court would construe and apply the statute differently and even more strictly than it had been construed and applied in the trial court. Neither by an exception to the trial judge's charge, on the ground that the statute as construed by the trial judge was unconstitutional, nor by any conceivable assignment of error could the plaintiff in error have raised in the trial court the question of the constitutionality of the statute as it was subsequently construed and applied by this court. That question was therefore not only material to a decision of the appeal of the plaintiff in error but it is properly before this court, since it originated here and is now called to the attention of this court by the plaintiff in error at the first opportunity for so doing. The plaintiff in error respectfully submits that under the decisions of the Supreme Court of the United States in Schenck v. U. S., 249 U. S. 47, 52; Fiske v. Kansas, 274 U. S. 380; and Stromberg v. California, 283 U. S. 359, the statute as construed and applied by this court is repugnant to the due process clause of the fourteenth amendment. This constitutional question was first presented by the decision of this court and should be considered by it before making a final determination of the appeal of the plaintiff in error. The plain-
[fol. 299] tiff in error respectfully submits that this court should grant a rehearing of the appeal so that the court may now consider and decide the question whether the statute as construed and applied by it is constitutional."

1. The language used by this court should be considered with the usual reasonable implications. The phrase "at any time," as criticized in the motion for rehearing, was not intended to mean at any time in the indefinite future, or at any possible later time, however remote. An activity now could hardly be expected to be the direct producing cause of an insurrection after the lapse of a great period of time, and it was not the purpose of this court to suggest that as to the mental requisite any such intent would be a sufficient ingredient of an attempt to incite an insurrection. On the contrary the phrase "at any time" was necessarily intended, and should have been understood, to mean within a reasonable time; that is, within

such time as one's persuasion or other adopted means might reasonably be expected to be directly operative in causing an insurrection. Accordingly, the statements by this court as quoted in the motion for rehearing are to be accepted in the following sense: [Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly [fol. 300] operative in causing such action by those whom he sought to induce. This statement, considered with what was said in the original decision, represents the view of this court as to the proper construction of the statute under consideration; and under the statute as thus interpreted, we say, as before, that the evidence was sufficient to authorize the conviction. In view of what has been said above, it would seem that all contentions made in the motion for rehearing should necessarily fail, based, as they are, upon an erroneous construction of our decision.]

2. But to treat the motion as urged to the same extent under the decision as properly interpreted, it is a mere attempt to draw into question the constitutionality of the statute under which the defendant was convicted, where no such question was raised and passed upon in the trial court. Under repeated rulings by this court, a constitutional question cannot be so presented. In Brown v. State, 114 Ga. 60 (2) (39 S. E. 873), it was said: "This court will never pass upon the constitutionality of an act of the General Assembly unless it clearly appears in the record that the point was directly and properly made in the court below and distinctly passed on by the trial judge." See also Griggs v. State, 130 Ga. 16 (60 S. E. 103); Convers v. Luther Williams Banking Co., 162 Ga. 350 (133 S. E. 862), and cit. In Loftin v. Southern Security Co., 162 Ga. 730 (3) (134 S. E. 760), this court held as follows: "Where it is sought to invoke a ruling by the Supreme Court on a constitutional question, the question must have been raised in the trial court and a ruling made thereon and the case brought to the Supreme Court for review." In Dunaway

v. Gore, 164 Ga. 219, 230 (138 S. E. 213), the following statement was made: "Indeed it may be said that under the provision of our constitution, art. 6, sec. 2, par. 5 (Code, [fol. 301] § 6502), which provides that the Supreme Court 'shall be a court alone for the correction of errors; this court would in no event have jurisdiction to consider the merits of any question which is either intentionally or unintentionally omitted in the trial court. It is upon errors alleged by the complaining party to have been committed in the court below that this court must confine itself." The provision of the State constitution as referred to in that case declares further, that "The Supreme Court • • • shall be a court alone for the trial and correction of errors of law from the Superior Courts and the City Courts of Atlanta and Savannah, and such other like courts as have been or may hereafter be established in other cities." The principles ruled in the foregoing decisions cannot be avoided by the circumstances referred to in the motion for rehearing. Regardless of the construction placed upon this statute either by the trial court or by this court, the defendant could have presented to the court below the construction which he deemed to be the proper one and in connection therewith could have attacked the statute upon any chosen constitutional ground. Cf. Hutchings v. Roquemore, 164 Ga. 637 (2) (139 S. E. 216).

In the brief it is stated that under the construction of the statute as adopted by this court, it is unconstitutional for the additional reason that it "at once becomes so indefinite and uncertain that a conviction under it necessarily is a denial of due process." What has been said will apply also to the contention thus made. Furthermore, in West v. Standard Insurance Co., 176 Ga. 54 (166 S. E. 761), it was said: "The constitutionality of a statute can not be raised for the first time in the brief of counsel filed in the Supreme Court." See also Houston v. Thomas, 168 Ga. 67, 72 (146 S. E. 908). Accordingly, no question as to the [fol. 302] constitutionality of § 56 is presented, and none is decided. The situation here is different from that involved in Holliman v. State, 175 Ga. 232 (165 S. E. 11), where this court held unconstitutional an act relating to applications for certiorari to review decisions and judgments of the Court of Appeals. The question there decided was one with which a trial court never could have been concerned.

The conclusion reached above is necessarily confined to the power and jurisdiction of this court and is not contrary to such decisions as the following, which relate to the power and jurisdiction of the United States Supreme Court. Grannis v. Ordean, 234 U. S. 385, 392 (34 Sup. Ct. 779, 58 L. ed. 1363); Saunders v. Shaw, 244 U. S. 317 (37 Sup. Ct. 638); Missouri ex rel. Mo Ins. Co. v. Gehner, 281 U. S. 313 (50 Sup. Ct. 326); Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673 (50 Sup. Ct. 451); American Surety Co. v. Baldwin, 287 U. S. 156 (53 S. E. 98). There is no merit in the motion for rehearing.

The foregoing has been prepared as the decision of this court in accordance with the views of the majority. The writer concurs in all that is said in the first division, and agrees also that the motion for rehearing should be denied. He does not, however, deem it necessary to commit himself either way at this time upon the correctness, under the particular facts of this case, of the reasons given above for the refusal to decide the constitutional question, referred to in the motion for rehearing. In the opinion of the writer, the same conclusion may be reached upon a different basis, as to which certain observations will now be made. In the following discussion, however, he will speak for himself alone and the views expressed will constitute no part of the decision, nor be taken as representing the opinion of any of the other Justices.

[fol. 303] In order to raise a constitutional question, it is necessary, among other things, that the particular provision of the constitution alleged to have been violated by the statute shall be clearly designated. Griggs v. State, supra; Spielberger v. Hall, 159 Ga. 511 (2) (126 S. E. 391); Inlow v. State, 168 Ga. 377 (147 S. E. 881). And it must also be stated wherein that provision of the constitution is violated. Pace v. Goodson, 127 Ga. 211; Curtis v. Helen, 171 Ga. 256 (2 c) (155 S. E. 202); Jordan v. State, 172 Ga. 857 (159 S. E. 235).

The due process clause of the fourteenth amendment relates to life, liberty, and property, and there is more than one kind of liberty. The term may include but is not limited to freedom of speech. Stromberg v. California, 283 U. S. 359 (3) (51 Sup. Ct.) 532). The motion fails to state whether it is this or some other right or liberty of which the movant claims to have been deprived by the statute

under consideration, and it is only by a study of the decisions cited therein and by statements in the accompanying brief that one is able to discern that it is liberty of speech which the statute is deemed to unwarrantable abridge. Obviously therefore, the motion does not make a sufficiently definite attack upon the constitutionality of this statute, under the settled rule in this State.

But even to consider on its merits the question thus suggested, it is clear that the statute does not violate the due process clause of the fourteenth amendment as related to liberty of speech. Any such contention would appear to be conclusively answered by the decisions of the Supreme Court of the United States in Gitlow v. New York, 268 U. S. 652 (45 Sup. Ct. 625); Whitney v. California, 274 U. S. 357 (47 Sup. Ct. 641). In the case last cited Mr. Justice Brandeis filed a special concurrence in which he was joined [fol. 304] by Mr. Justice Holmes. Even in that opinion it was said that the right of free speech is not absolute and is subject to restriction "if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political economic or moral." And in the same opinion it was further said, "That the necessity which is essential to a valid restriction does not exist unless speech would produce, *or is intended to produce*, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled." [Italics ours.] In connection with the statement the author cited the case of Schenck v. United States, 249 U. S. 47, 52 (39 Sup. Ct. 247).

Under the statement made in the foregoing opinion by the court as to the sense and meaning of the original decision in the present case, the statute does not fail for want of sufficient certainty. All men subject to its penalties may well know what acts it is their duty to avoid. United States v. Brewer, 139 U. S. 278 (11 Sup. Ct. 538, 35 L. ed. 190). See again the decision in Whitney v. California, supra.

Motion for rehearing denied. All the Justices concur, except

Russell, C. J. Not having participated in the original opinion delivered by the court, I decline to participate in the hearing upon the motion for rehearing.

[fol. 305] IN SUPREME COURT OF GEORGIA

ORDER DENYING MOTION FOR REHEARING—September 28, 1934

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

ANGELO HERNDON

v.

THE STATE

Upon consideration of the motion for a rehearing filed in this case it is ordered that it be hereby denied.

[fol. 306] IN SUPREME COURT OF THE UNITED STATES

October Term, 1934

[Title omitted]

ORDER ALLOWING APPEAL

The appellant in the above entitled cause having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from a judgment made and rendered in the above entitled cause by the Supreme Court of the State of Georgia, on May 24, 1934, and from the order and judgment made and rendered by the said Court on September 28, 1934, denying the petition of said appellant for a rehearing in said cause, and from each and every part of said judgments and orders, and having presented and filed his petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is now hereby ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Georgia in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Georgia shall prepare and certify a transcript of

the record, proceedings, and judgments in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within [fol. 307] forty days from this date;

And it is further ordered that security for costs on appeal be fixed in the sum of Five Hundred Dollars.

Dated December 19th, 1934.

Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia.

[fol. 308] IN SUPREME COURT OF THE UNITED STATES

October Term, 1934.

[Title omitted]

Petition for Appeal, Assignments of Error and Prayer for Reversal—Filed Dec. 26, 1934

PETITION FOR APPEAL

To the Honorable the Supreme Court of the United States:

Considering himself aggrieved by the final decision of the Supreme Court of the State of Georgia in the above entitled cause, the appellant herein, Angelo Herndon, hereby prays that an appeal be allowed to the Supreme Court of the United States, herein, and for an order fixing the amount of the bond as security for costs thereon, and for an order approving said bond.

ASSIGNMENT OF ERRORS

And the said Angelo Herndon assigns the following errors in the record and proceedings in the said case:

1. The Court below erred in holding that the questions of the constitutionality of Section 56 of the Penal Code of Georgia, as construed and applied to appellant, under the due process clause of the Fourteenth Amendment, were not properly presented for consideration by that Court.

2. The Court below erred in holding that the questions of the constitutionality of Section 56 of the Penal Code of

Georgia, as construed and applied by it to appellant, under the due process clause of the Fourteenth Amendment, should have been presented to the Trial Court.

[fol. 309] 3. The Court below erred in holding that it could not pass upon the questions of the constitutionality of Section 56 of the Penal Code of Georgia, as construed and applied by it to appellant, under the due process clause of the Fourteenth Amendment, because they were not presented to the Trial Court.

4. The Court below erred in failing to pass explicitly upon the questions of the constitutionality of Section 56 of the Penal Code of Georgia, as construed and applied by it to appellant, under the due process clause of the Fourteenth Amendment.

5. The Court below erred in holding that Section 56 of the Penal Code of Georgia, as construed by it, did not deprive appellant of his liberty, without due process of law in violation of the Fourteenth Amendment.

6. The Court below erred in holding that the application of Section 56 of the Penal Code of Georgia, as construed by it, did not deprive appellant of his liberty, without due process of law, in violation of the Fourteenth Amendment.

7. The Court below erred in holding that Section 56 of the Penal Code of Georgia, as construed by it, was not so uncertain as to violate appellant's constitutional rights under the due process clause of the Fourteenth Amendment.

8. The Court below erred in holding that Section 56 of the Penal Code of Georgia, as construed by it, was not so uncertain that its application to appellant violated his constitutional rights, under the due process clause of the [fol. 310] Fourteenth Amendment.

9. The Court below erred in holding that under Section 56 of the Penal Code of Georgia, as construed by it, there was sufficient evidence to sustain appellant's conviction.

10. The Court below erred in holding that appellant's conviction, under Section 56 of the Penal Code of Georgia, did not deprive him of his liberty, without due process of law, in violation of the Fourteenth Amendment.

11. The Court below erred in affirming the judgment of conviction.

12. The Court below erred in failing to hold that the questions of the constitutionality of Section 56 of the Penal Code of Georgia, as construed and applied to appellant, under the due process clause of the Fourteenth Amendment, were properly presented for consideration by that Court.

13. The Court below erred in failing to hold that the questions of the constitutionality of Section 56 of the Penal Code of Georgia, as construed and applied by it to appellant, under the due process clause of the Fourteenth Amendment, could not have been and need not have been presented to the Trial Court.

14. The Court below erred in failing to hold that it could pass upon the questions of the constitutionality of Section 56 of the Penal Code of Georgia, as construed and applied by it to appellant, under the due process clause of the Fourteenth Amendment, even though they were not presented to the Trial Court.

[fol. 311] 15. The Court below erred in failing to hold that Section 56 of the Penal Code of Georgia, as construed by it, deprived appellant of his liberty, without due process of law, in violation of the Fourteenth Amendment.

16. The Court below erred in failing to hold that the application of Section 56 of the Penal Code of Georgia, as construed by it, deprived appellant of his liberty, without due process of law, in violation of the Fourteenth Amendment.

17. The Court below erred in failing to hold that Section 56 of the Penal Code of Georgia, as construed by it, was so uncertain as to violate appellant's constitutional rights under the due process clause of the Fourteenth Amendment.

18. The Court below erred in failing to hold that Section 56 of the Penal Code of Georgia, as construed by it, was so uncertain that its application to appellant violated his constitutional rights, under the due process clause of the Fourteenth Amendment.

19. The Court below erred in failing to hold that under Section 56 of the Penal Code of Georgia, as construed by it, there was not sufficient evidence to sustain appellant's conviction.

20. The Court below erred in failing to hold that appellant's conviction, under Section 56 of the Penal Code of Georgia, deprived him of his liberty without due process of law, in violation of the Fourteenth Amendment.

21. The Court below erred in failing to set aside the judgment of conviction.

[fols. 312-329] Prayer for Reversal.

For which errors the appellant, Angelo Herndon, prays that the said judgment of the Supreme Court of the State of Georgia, dated May 24, 1934, affirming the judgment of conviction against appellant, and the decision and judgment of said Supreme Court of Georgia, dated September 28, 1934, in the above entitled cause, denying appellant's petition for rehearing, be reversed and a judgment rendered in favor of the said appellant, setting aside his conviction, releasing him from custody, and directing the cancellation and return of his bail, and for costs and for all other proper relief.

Dated December 15th, 1934

Whitney North Seymour, Attorney for Petitioner and Appellant.

[File endorsement omitted]

[fols. 330-332] Citation in usual form showing service. M. J. Yeomans et al. Filed Dec. 26, 1934. Omitted in printing.

[fols. 333-336] Bond on Appeal for $500.00 approved and filed Jan. 3, 1935. Omitted in printing.

[fol. 337] In Supreme Court of the United States

October Term, 1934.

[Title omitted]

Præcipe for Transcript of Record—Filed Jan. 3, 1935

To the Clerk of the Supreme Court of Georgia:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States pursuant to an appeal duly allowed in the above entitled cause and to include in such transcript of record the following, to wit:

1. The copy of the record duly certified on July 5, 1934, including:

(a) Bill of exceptions (pp. 1-204 of copy of record certified on July 5, 1934).

(b) Counter-showing of the State to the motion for new trial (pp. 205-224 of copy of record certified on July 5, 1934).

(c) Opinion of the Supreme Court of Georgia rendered May 24, 1934 (pp. 225-273 of copy of record certified on July 5, 1934).

(d) Judgment of Supreme Court of Georgia (p. 274 of copy of record certified on July 5, 1934).

(e) Notice of intention to certiorari and supersedeas and orders thereon (pp. 275-277 of copy of record certified on July 5, 1934).

(f) Certificate certifying the copy of the record on July 5, 1934 (p. 278 of copy of record certified on July 5, 1934).

2. Petition to the Supreme Court of Georgia for leave to file petition for rehearing (including Exhibits A, B and C).

3. Petition for rehearing.[2]

Footnote 2: The petition for rehearing need not be included twice and if included as Exhibit C under Item 2, it need not be included again under Item 3.

[fol. 338] 4. Opinion denying petition for rehearing.

5. Appellant's statement of jurisdiction.

6. Appellant's petition for appeal, assignments of error and prayer for reversal.

7. Order allowing appeal dated December 19, 1934.

8. Copy of citation issued upon appeal and acknowledgment of service.

9. Copy of bond for costs.

10. Copy of appellant's statement directing attention to the provisions of Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States.

11. Proof of service of the foregoing papers numbered 5, 6, 7, 8 and 10.

12. This præcipe and acknowledgment of service thereof.

Said transcript to be prepared as required by law and by the Rules of the Supreme Court of Georgia and the Rules of the Supreme Court of the United States, and to be delivered to the attorney for the appellant in time for filing in the office of the Clerk of the Supreme Court of the United States at Washington, D. C. or to be filed in the office of the Clerk of the Supreme Court of the United States at Washington, D. C. on or before January 26, 1935. Dated December 27, 1934.

Whitney North Seymour, Attorney for Appellant,
120 Broadway, New York, N. Y.

Service of above praecipe accepted and acknowledged this 3 day of January, 1935. All other and further service of notice waived.

M. J. Yeomans, Attorney General of the State of Georgia.
John A. Boykin, Solicitor General of Fulton County,
Attorneys for Appellee.

[File endorsement omitted]

[fol. 339] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 340] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH THE APPELLANT INTENDS TO RELY AND DESIGNATION OF PORTIONS OF THE RECORD NECESSARY FOR THE CONSIDERATION OF THE SAME.—Filed Jan. 24, 1935

Comes now the appellant in the above entitled cause and adopts his assignments of errors as his statement of the points to be relied upon in this Court.

The appellant thinks the following portions of the record are necessary to a consideration of these points:

1. The bill of exceptions (omitting, however, (a) the description of documentary evidence in the amended motion for a new trial, beginning with "Document No. 1", page 17, through "P.O. Box 339", page 46;[1]

(b) the further description of documentary evidence in the amended motion for a new trial, beginning with "Document No. 12", middle of page 52, through the end of the [fol. 341] description of Document No. 12 at the middle of page 5[illegible];[2]

(c) testimony with respect to exclusion of Negroes from juries contained in the amended motion for a new trial, bottom page 55 to bottom page 57, bottom page 61 to bottom page 63, bottom page 64 to middle page 66;

(d) the counter-showing of the State on the motion for a new trial, pp. 206-222.)

2. Opinion of the Supreme Court of Georgia rendered May 24, 1934.

3. Judgment of Supreme Court of Georgia.

4. Notice of intention to certiorari and supersedeas and orders thereon.

Footnote 1: This is a repetition of matter contained in the brief of documentary evidence, pp. 146-186. Page references are to pages of certified record prepared by the Clerk of the Supreme Court of Georgia.

Footnote 2: This is also a repetition of matter contained in the brief of documentary evidence.

5. Petition to Supreme Court of Georgia for leave to file petition for rehearing.

6. Petition for rehearing.

7. Opinion denying petition for rehearing.

8. Statement of jurisdiction pursuant to Rule 12 (1).

9. Petition for appeal, assignments of error and prayer for reversal.

10. Order allowing appeal.

11. Bond for costs.

12. Citation and acknowledgment of service.

13. Statement directing attention to the provisions of paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States.

14. Proof of service of the foregoing papers numbered 8, 9, 10, 12 and 13.

[fols. 342 & 343] 15. Appellant's praecipe.

New York, N. Y., January 21, 1935.

Whitney North Seymour, Attorney for Appellant, 120 Broadway, New York, N. Y.

[fol. 344] SUPREME COURT OF THE UNITED STATES

STATE OF NEW YORK,
County of New York, ss:

Joseph Romer, being duly sworn, deposes and says:

I am over the age of twenty-one years and reside at No. 1900 51st Street, in the Borough of Brooklyn, City and State of New York.

On January 23, 1935, I served copies of appellant's "statement of the points on which he intends to rely and of the parts of the record which he thinks necessary for the consideration thereof" upon the appellee, by mailing copies thereof, by registered mail, in securely sealed and duly addressed envelopes, to the Attorney General of the State of Georgia and the Solicitor General of Fulton County,

Georgia, both at Atlanta, Georgia. Said copies were mailed by depositing the same in a branch post office situated at 30 Church Street, New York, N. Y.

Joseph Romer.

Sworn to before me this 23rd day of January, 1935.
Joseph Giordano, Notary Public, Kings County Clk's No. 668, Reg. No. 5314.

N. Y. Co. Clk's No. 739, Reg. No. 5G446.
Commission expires March 30, 1935. (Seal).

[fol. 345] [File endorsement omitted.]

Endorsed on cover: File No. 39,293. Georgia, Supreme Court. Term No. 665. Angelo Herndon, Appellant vs. The State of Georgia. Filed January 24, 1935. File No. 665 O. T. 1934.

(6037-C)

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Opinions below	1
Jurisdiction	2
Appeal timely taken	2
Finality of judgment	2
Judgment of the higest court	2
Validity of a State statute, drawn in question and decision in favor of its validity	3
The statute	3
Nature of the case	5
Appellant's contentions	9
Federal questions were properly raised in the court below and this court has jurisdiction of the appeal	10
Substantial Federal questions are presented	12
Conclusion	17

Table of Cases Cited.

Abrams v. United States, 250 U. S. 616	12
American Surety Co. v. Baldwin, 287 U. S. 156	11
Borden's Farm Products Co., Inc., v. Baldwin, No. 296, October Term, 1934, decided December 3, 1934	15
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673	11
Connally v. General Construction Co., 269 U. S. 385	16
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282	12
Debs v. United States, 249 U. S. 211	12
Fiske v. Kansas, 274 U. S. 380	12, 13, 16
Gitlow v. New York, 268 U. S. 652	13
Grannis v. Ordean, 234 U. S. 385	11
Great Northern R. Co. v. Sunburst Oil Ref. Co., 287 U. S. 358	11
Hamilton v. Regents of University of California, No. 55, October Term, 1934, decided December 3, 1934	13
Herndon v. State of Georgia, 178 Ga. 832	1
Herndon v. State of Georgia, 176 S. E. 620	2
Lawrence v. State Tax Commission, 286 U. S. 276	11
Missouri v. Gehner, 281 U. S. 313	11
Near v. Minnesota, 283 U. S. 697	13
Pierce v. United States, 252 U. S. 239	12
Saunders v. Shaw, 244 U. S. 317	11
Schenck v. United States, 249 U. S. 47 (1919)	12
Standard Chemicals & Metals Corp. v. Waugh Chemical Corp., 231 N. Y. 51	16

Page

Stromberg v. California, 283 U. S. 359 13
United States v. L. Cohen Grocery Co., 255 U. S. 81 16
Whitney v. California, 274 U. S. 357 13

STATUTES AND OTHER AUTHORITIES CITED.

Act of the Georgia Legislature of May 19, 1804, a Compilation of the Laws of Georgia, 1800-1810 (Augusta 1812) 14
Constitution of the United States, 14th Amendment 3, 9, 10, 11, 16
Georgia Penal Code (1817), Div. III, Section 4 14
Judicial Code, Section 237, as amended by the Acts of February 13, 1925, January 31, 1928 and April 26, 1928 2
Penal Code of Georgia, Section 55 (Acts 1866, pp. 152, 153) 3
Section 56 (Acts 1871-1872, pp. 19, 20) 3
Section 57, (Acts 1866, 152, 153, as amended by Acts 1871, pp. 19, 20) 3
"Revolutionary Radicalism," The Report of the Joint Legislative Committee of the State of New York Investigating Seditious Activities, 1920 ....

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 665

ANGELO HERNDON,

Appellant,

vs.

THE STATE OF GEORGIA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

Statement of Jurisdiction.

In compliance with Rule 12 of this Court appellant submits herewith his statement showing the basis of this Court's jurisdiction in the above entitled cause.

Opinions Below.

The original opinion of the Supreme Court of Georgia (R. 225-274) [1] is reported in 178 Ga. 832. Its opinion upon

---

[1] References to the original record are to the pages of the record certified by the Clerk of the Supreme Court of Georgia which has not yet been printed. At the time of the preparation of this statement the petition for rehearing and the opinion upon the denial of the petition for rehearing have not yet been included in the certified record. References to the petition for rehearing are given as (P. R.) and references to the opinion denying the petition for rehearing are given as (O. D. R.).

the denial of the petition for rehearing (O. D. R. 1-11) is reported in 176 S. E. 620 but has not yet been officially reported. No opinion was rendered by the trial court. Its charge to the jury appears at R. 187-199.

Jurisdiction.

The jurisdiction of this Court to review the judgment of the court below is conferred by Section 237 of the Judicial Code as amended by the Acts of February 13, 1925, January 31, 1928, and April 26, 1928.

(1)

Appeal Timely Taken.

The original judgment of the Supreme Court of Georgia was entered May 24, 1934 (R. 274). That court entertained a petition for rehearing filed August 20, 1934 (R. R. 8-11) and denied the petition for rehearing September 28, 1934 (O. D. R. 1-10). The petition for appeal was presented to Hon. Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia, on December 19, 1934, and the appeal was allowed by him on that date.

(2)

Finality of Judgment.

The judgment from which the appeal is taken is final both in form and substance. The judgment affirms a judgment of conviction and disposes of all elements of the controversy.

(3)

Judgment of the Highest Court.

The judgment of the Supreme Court of Georgia is that of the highest court in which, under the laws of the State, such judgment could be had.

(4)

Validity of a State Statute Drawn Into Question and Decision in Favor of Its Validity.

In this case appellant contended in the court below that a statute of the State of Georgia as construed and applied was repugnant to the Fourteenth Amendment to the Constitution of the United States and the decision rendered by the court below was in favor of its validity.

(a)

The Statute.

The statute, the validity of which was drawn into question, is Section 56 of the Penal Code of Georgia (Acts 1871-1872, pp. 19, 20) which provides:

> Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection.[2]

---

[2] The punishment for an attempt to incite insurrection is contained in Section 57 of the Penal Code (Acts 1866, pp. 152, 153, as amended by Acts 1871, pp. 19, 20) which is as follows:

> Any person convicted of the offence of insurrection, or an attempt to incite insurrection, shall be punished with death; or, if the jury recommend to mercy, confinement in the penitentiary for not less than five nor more than twenty years.

Insurrection is defined in Section 55 of the Penal Code (Acts 1866, pp. 152, 153) as follows:

> Insurrection shall consist in any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence.

In its original opinion, the Supreme Court of Georgia construed Section 56 to make criminal all attempts to persuade others to combine in forcible resistance to the State, no matter how remote the time when it is advocated or intended that force should be employed, and no matter how unlikely it is that the attempted persuasion will lead to acts which are unlawful or which threaten the sovereignty of the State. In its opinion upon rehearing the Supreme Court adopted the following modified construction:

> "Force must have been contemplated, but the statute does not include either its occurrence or imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would (be) sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce."

Thus, the only limitation imposed by the final construction is that the defendant must have intended that those whom he attempted to persuade should resort to violence at a time "within which he might reasonably expect his influence to continue to be directly operative" as a stimulus to such action.[1] Both upon original hearing and upon rehearing, the Supreme Court of Georgia, after setting forth its interpretation of the statute, concluded that the evidence supported a conviction under the statute as construed.

---

[1] This does not mean that objectively there must be reasonable grounds for believing that the attempted persuasion would be effective at all. The qualification has reference only to the defendant's intention.

(b)

Nature of the Case.

On July 11, 1932 (R. 122) appellant, a Negro, was arrested without a warrant (R. 239) as he opened his mail box, No. 339, in the Federal Post Office Building in Atlanta, Georgia (R. 97) with the key in his possession (R. 97). Upon the instructions of Assistant Solicitor General Stephens the police had been lying in wait for anyone who came to the box because a Commissioner had complained about receiving a "scurrilous" letter bearing that box number (R. 102). The alleged letter was never offered in evidence nor were its contents ever divulged.

No charge of any kind was made against appellant until eleven days after his arrest, when a writ of habeas corpus was sued out to effect his release (R. 122). The court said upon the hearing of the writ that appellant would be released on the following day unless an indictment should be obtained. Appellant was indicted on July 22, 1932, for attempting on July 16, 1932, to incite insurrection (R. 7-11).[4]

The evidence introduced against appellant at the trial consisted of the testimony of three witnesses and certain documents, some of which related to the Communist Party. A part of these documents was in a box under appellant's arm at the time of his arrest; the remainder were found in his room when it was later searched without a warrant (R. 99, 239). The three State witnesses were Watson, the arresting officer (R. 97), Clonts, a clerk in the post office (R. 100), and Assistant Solicitor General Stephens (R. 102).

Clonts' testimony concerned only the identity of appellant as lessee of the post office box which he was opening at the

---

[4] On July 16, 1932, and for a number of days before and after that date appellant was actually in jail.

time of his arrest. Watson and Stephens identified the documents in evidence as taken from appellant's person or his room. Both testified that appellant after his arrest had stated that he was an organizer for the Communist Party and Stephens testified that appellant had described his duties as an organizer: "To call meetings, disseminate information regarding the party at these meetings; to distribute literature, to secure members for the meetings and generally to work up an organization of the Communist Party in Atlanta" (R. 104). Stephens further testified that appellant had stated that he held or had attended two or three meetings and had "five or six actual members" of the Communist Party in Atlanta (R. 105).

Neither Watson nor Stephens testified to further knowledge of any offense or activities by appellant. Neither had seen appellant before his arrest nor had any personal knowledge of his previous activities (R. 99, 107, 109, 110). Stephens testified that appellant stated that he was the author of one or two of the documents in evidence (Nos. 30 or 31, R. 183-6), both of which were characterized by the court below as "more or less harmless" (R. 256).

The documents seized by the police officers and which make up the balance of the State's evidence, consist in part of literature published in the interests of the Communist Party, and one or more books of radical economic character apparently used only for appellant's own perusal.[5]

Appellant was shown to have distributed copies of two of the papers in evidence. These were the two described by the court below as "more or less harmless." Of the remaining documents thirteen were mentioned in the court's

---

[5] Copies of the Bible, the "Atlanta Constitution" and other literature found in appellant's possession were not offered in evidence by the State (R. 110).

opinion and may thus be assumed to have influenced the decision particularly. Nine of these thirteen were membership books of the Communist Party (3-11, R. 146, 151), which contained a general description of the Communist Party, its aims and purposes. Three of the thirteen documents, "The Communistic Position on the Negro Question" (Document 13, R. 156-157), "An Appeal to Southern Young Workers" (Document 16, R. 169-170), and "Party Organizer" (Document 17, R. 170) were Communist publications containing party propaganda. The other document relied on by the court below, a book entitled "Communism and Christianism" (Document 15, R. 161-171) was not shown to have any connection with the Communist Party and was apparently mere personal reading matter. The documents which had some connection with the Communist Party contain no exhortation or incitations to violence,[6] immediate or remote. The documents expound and advocate the general aims of the Communist Party such as unity of all workers and organization to improve the conditions of the working class. They advocate certain specific measures such as equal political and economic rights of Negroes, "self-determination for the Black Belt," punishment of lynchers, disbanding of military units, abolition of child labor, minimum wages, maximum working hours, strikes and boycotts. Occasionally there is an unexpounded use of the words "revolution" or "revolutionary" in describing the cooperative activities of the Party members. Nowhere is it indicated that revolution by violence is implied; on the contrary the context shows that the words are used in the same sense as the word "revolution" is used in the common phrase "industrial revolution," as a description of signifi-

[6] The only use of the word is in "Communism and Christianism" in a context which shows that it was not a word of incitation.

cant change. The documents did not advocate forcible resistance to the authority of the State.

At the trial appellant made a statement to the court in which he stated his belief that the real reason for his arrest was that he had organized an appeal by the unemployed to the city authorities administering relief. In the course of this statement he expressed his judgment that "the system we are living under is on the verge of collapse and that the unemployed have a right to demand food and shelter from the government." Nothing in the statement indicated that he had urged others to resist the authority of the State (R. 118-128) nor was it reasonable to imply from it that appellant thought the time ripe for violent action. Thus all the evidence at the trial established only that Herndon had admitted being an organizer for the Communist Party and that he had in his possession the documents which have been described above.

At the conclusion of the evidence the trial court charged the jury in part as follows:

> "• • • that advocacy, however reprehensible morally, is not sufficient to convict the defendant where there is no evidence to indicate that the advocacy would be acted upon immediately. In order to convict the defendant, Gentlemen, it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or was advocated."

The jury returned a verdict of guilty but recommended mercy, fixing the penalty at from 18 to 20 years in the penitentiary (R. 12) and sentence was passed accordingly (R. 202). A motion for a new trial (R. 16-80) was denied by the trial court (R. 80).

On writ of error the court below impliedly rejected the trial court's construction of the statute requiring that "im-

mediate serious violence against the State of Georgia was to be expected or was advocated,'" and instead interpreted the statute upon rehearing, as has been pointed out above, to require only that violence must have been intended at a time "within which he might reasonably expect his influence to continue to be directly operative." In terms of this construction, which materially differed from that of the trial court, the Supreme Court evaluated the evidence and concluded that it supported the judgment of conviction.

(c)

Appellant's Contentions.

Appellant contends:

(1) That the statute as construed and applied by the Supreme Court of Georgia unreasonably restricts appellant's freedom of speech and of assembly and is, therefore, invalid under the due process clause of the Fourteenth Amendment to the Federal Constitution.

(2) That the statute as construed by the Supreme Court of Georgia contains a standard of guilt which is so vague and uncertain that it is not susceptible of reasonable application and, therefore, is invalid under the due process clause of the Fourteenth Amendment to the Federal Constitution.

---

[1] The original construction of the statute by the court below was in connection with its consideration of the question whether the evidence was sufficient to support the verdict. Before embarking on the discussion of the construction the court below said in its original opinion:

> "Before proceeding to examine the evidence, however, it is proper to determine the exact nature of the offense alleged to have been committed" (R. 252).

(5)

Federal Questions Were Properly Raised in the Court Below and this Court Has Jurisdiction of the Appeal.

Appellant contended in his petition for rehearing in the court below that the construction and application of the statute by the Supreme Court of Georgia rendered it invalid under the due process clause of the Fourteenth Amendment. The Supreme Court's interpretation of the statute in its first opinion differed radically from that of the trial court under which the case was submitted to the jury. The latter required a finding that immediate serious violence against the State of Georgia was to be expected or was advocated; the former rendered immaterial both the immediacy of the violence advocated and the danger that violence would ensue at any time. Thus the statute applied by the Supreme Court in holding the evidence sufficient to sustain the verdict and judgment imposed an entirely new and far more rigorous standard of liability than that imposed by the statute as interpreted by the trial court, and obviously an attack upon the validity of the statute as construed by the appellate court raises a Federal question which is different from and more serious than the question of the validity of the statute as construed by the trial court. On writ of error to the court below appellant was reasonably content to rest his case upon the sufficiency of the evidence as a matter of State law to meet the standard declared by the trial court, and upon the other questions raised at the trial, which are not presented here. He was not required to anticipate in the trial court that the appellate court would not consider the sufficiency of the evidence under the standard of liability laid down by the trial court, but would rather consider its sufficiency under another standard which is more rigorous, and which renders the statute invalid

under the Fourteenth Amendment. The Federal question of the validity of the statute as interpreted and applied by the Supreme Court arose in that Court from its "unanticipated act" in giving the statute "a new construction which threatened rights under the Constitution" (*American Surety Co.* v. *Baldwin*, 287 U. S. 156, 164). It was, therefore, seasonably presented upon the petition for rehearing.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673;
Missouri v. *Gehner*, 281 U. S. 313;
Cf. *Saunders* v. *Shaw*, 244 U. S. 317;
Grannis v. *Ordean*, 234 U. S. 385;
Great Northern R. Co. v. *Sunburst Oil Ref. Co.*, 287 U. S. 358, 367;
American Surety Co. v. *Baldwin*, *supra*.

The validity of the statute as finally interpreted by the Supreme Court in its opinion denying the petition for rehearing is accordingly properly before this Court. It is immaterial that the final interpretation modified somewhat that contained in the original opinion, for the final interpretation also effectively omits those material conditions of liability which rendered the statute innocuous as interpreted by the trial court and, in addition, for the first time renders the standard of liability so uncertain as to be incapable of enforcement. It is also immaterial that the State court refused to consider the Federal questions presented in the petition for rehearing. It is not a condition of this Court's jurisdiction that the Federal questions be considered by the State court, but only that they be seasonably presented there. A claim of Federal right is denied "as well by the refusal of the State court to decide the question, as by an erroneous decision of it." (*Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282.)

This Court has jurisdiction on appeal to determine whether a State statute as construed and applied by the

highest court of the State is in conflict with the Federal Constitution, (*Fiske* v. *Kansas*, 274 U. S. 380, 385-386; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 288-289), and where necessary to vindicate Federal rights, this Court will consider whether there is any evidence to support the conclusions of fact of the State court (*Fiske* v. *Kansas, supra*).

(6)

Substantial Federal Questions are Presented.

1. Whether a State may make criminal any attempt by persuasion to induce others to combine together for the purpose of achieving fundamental changes in the economic, social and political structure of a State or other portion of the United States, provided only that the person making the attempt intended that forcible resistance to the State should occur "at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce," is a substantial Federal question.

The statute, as construed by the court below, is invalid under the criterion enunciated by this Court in *Schenck* v. *United States*, 249 U. S. 47 (1919) that to justify an abridgement of the freedom of speech guaranteed by the First Amendment the words spoken or otherwise disseminated must be used "in such circumstances" and be "of such a nature as to present a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" (249 U. S. 47, 52). See also *Debs.* v. *United States*, 249 U. S. 211. Whether or not that criterion has been departed from has never been authoritatively determined. Cf. *Abrams* v. *United States*, 250 U. S. 616; *Pierce* v. *United States*, 252 U. S. 239. That freedom of speech and assembly are comprehended within the "liberty" guaranteed by the due process clause of the Fourteenth Amend-

ment is, however, settled—(*Gitlow* v. *New York*, 268 U. S. 652, 666; *Whitney* v. *California*, 274 U. S. 357, 362, 371, 373; *Fiske* v. *Kansas*, 274 U. S. 380, 382; *Near* v. *Minnesota*, 283 U. S. 697, 707; *Stromberg* v. *California*, 283 U. S. 359, 368; *Hamilton* v. *Regents of University of California*, No. 55, October Term 1934, decided December 3, 1934). And in two cases a minority of the Court has affirmed the applicability to the guaranty of the Fourteenth Amendment of the clear and present danger test set forth in *Schenck* v. *United States, supra*, while the majority of the Court has sustained the application of the State statute on the ground that the passage of the act, making criminal the advocacy of the overthrow of the Government by force or the formation of an association for the purpose of such advocacy, evidenced a legislative finding that the proscribed utterance or association involve great danger of the type of substantive evil which the State may prevent. (*Gitlow* v. *New York, supra; Whitney* v. *California, supra.*)

The Georgia statute, as construed by the highest court of the State, cannot be supported by either criterion. The degree of danger of substantive evil and the immediacy of the violence advocated are expressly declared to be immaterial. Moreover the statute, unlike those presented in the *Gitlow* and *Whitney* cases, does not declare that specific utterances or associations are criminal; it punishes "any attempt by persuasion or otherwise" to achieve a specific result—the inducement of others to combine in resistance to the State that will at some time be forcible in nature. It is thus a case where, as in *Schenck* v. *United States, supra*, "The statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results" (*Gitlow* v. *New York, supra*, pp. 670-671).

It was said in *Gitlow* v. *New York, supra,* p. 671, that before a statute of this sort may be applied so as to make a particular utterance criminal, "it must necessarily be found as an original question, without any previous determination by the legislature, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection." That inquiry is precisely the one which the trial court's interpretation of the statute required and the construction of the court below excluded. Moreover, even if the present statute were regarded as in the same class with those involved in the *Gitlow* and *Whitney* cases, its validity was not determined by those decisions. The New York statute was passed in 1902 after the assassination of President McKinley by an anarchist and was applied in a period of post-war emergency, when the New York legislature was considering further means to suppress what it regarded as wide-spread seditious activity (see *"Revolutionary Radicalism,"* The Report of the Joint Legislative Committee of the State of New York Investigating Seditious Activities, 1920); the California statute was passed shortly before its application at a time when, according to its preamble "large numbers of persons are going from place to place in this State, advocating, teaching and practicing criminal syndicalism" (See concurring opinion of Brandeis, J., *Whitney* v. *California, supra,* p. 378). But the Georgia statute was passed in 1866, an adaptation of a statute directed against the fomenting of insurrection among the slaves which goes back to 1804 (See the Act of May 19, 1804, A Compilation of the Laws of Georgia, 1800-1810 (Augusta, 1812); Georgia Penal Code (1817), Div. III, § 4). With one possible exception Section 56 apparently languished unused until it was resurrected in the present case to prevent discharge of appellant from custody following the admonition of the court on a *habeas*

corpus hearing that appellant would be discharged unless he was indicted. It cannot be regarded, in any respect, as a legislative finding that attempted persuasion to join the Communist Party or to induce others to support the program of that party gives rise to grave danger of such substantive evil as the State may prevent. The presumption of constitutionality attributed to the statutes in the *Gitlow* and *Whitney* cases is one of fact which is rebuttable (*Borden's Farm Products Co., Inc.* v. *Baldwin*, No. 296, October Term, 1934, decided December 3, 1934). The sovereignty of Georgia is secure[8] and there is no evidence whatever that appellant sought or urged its violent overthrow. It cannot reasonably be believed that in Georgia "the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion." See *Whitney* v. *California*, *supra*, concurring opinion of Mr. Justice Brandeis, p. 377.

The construction of the statute by the court below cannot be regarded as a reasonable exercise of the State's police power to protect it against violent assault and a statute so construed must be regarded as an arbitrary interference with the right of appellant to express his views and to organize those with similar views for political action.

The evidence upon which appellant was convicted is summarized in the statement of the nature of the case, *supra*

[8] Appellant admitted that he had only five or six actual members of the Communist Party in Atlanta (R. 104). In 1932 the Communist candidate for President of the United States polled 23 votes in the whole State of Georgia, and in 1928 the Communist candidate polled a total of 64 votes in the entire State. In 1924 no votes were cast for the Communist candidate. In 1920 there was no Communist candidate. Georgia's steady and almost unanimous adherence to the tenets of one of the major American political parties, demonstrates its tenacity of political opinion.

(p. 5). Under *Fiske* v. *Kansas*, 274 U. S. 380, *supra*, the evidence did not justify the conviction of appellant under the statute as construed by the court below and application of the statute to appellant accordingly deprived him of his liberty without due process of law in violation of the Fourteenth Amendment.

2. Whether the statute, as construed by the Supreme Court of Georgia, contains a standard of liability which is so vague and uncertain that it is not susceptible of reasonable application and, therefore, is invalid under the due process clause of the Fourteenth Amendment is also a substantial Federal question. This question arises from the construction of the statute by the court below upon rehearing. Under its construction it is not necessary to guilt that the defendant should actually believe that his efforts would cause violent resistance to the authority of the State. A jury, possibly influenced by the passion and prejudice engendered by the views of an unpopular minority, would be free to speculate whether a defendant should reasonably have believed that his influence would, at any time, however remote, be operative in causing an insurrection. The influence of an expression of opinion in a political or economic field, the period required for persuasion to become effective, the trajectory of an idea involving action by large numbers of people are completely outside the experience of ordinary men. The construction of the statute by the court below leaves the criteria of guilt completely indefinite and thus the statute becomes too vague and uncertain for valid enforcement.

See

United States v. *L. Cohen Grocery Co.*, 255 U. S. 81;
Connally v. *General Construction Co.*, 269 U. S. 385;
Standard Chemicals & Metals Corp. v. *Waugh Chemical Corp.*, 231 N. Y. 51.

Particularly where the statute limits the free exercise of constitutional rights on penalty of death, it is necessary that the rules of permissible conduct must be reasonably definite so that the citizen may know where the line is drawn and so that, being fairly on the right side of the line, he may not be deemed to have crossed it when inflamed passions rule men's decisions.

Wherefore it is respectfully submitted that the appellant in the above entitled cause comes within the proper jurisdiction of this Court.

WHITNEY NORTH SEYMOUR,
New York, N. Y.,
Attorney for Appellant.

(5891-C)

FILE COPY

FILED
MAR 16 1935
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 665.

ANGELO HERNDON,

Appellant,

v.

THE STATE OF GEORGIA.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA.

BRIEF FOR THE APPELLANT.

WHITNEY NORTH SEYMOUR,
Attorney for Appellant.

WALTER GELLHORN,
HERBERT T. WECHSLER,
CAROL KING,
of Counsel.

GALLO & ACKERMAN, Inc., 143 Liberty Street, Telephones—Rector 3-5856-7

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	3
Specification of Errors to Be Urged	9
Summary of Argument	10
Argument	13
Point I. The statute, as construed by the court below, is invalid because it unreasonably restricts the liberty of speech and assembly guaranteed by the Fourteenth Amendment	13
Point II. The challenged statute is also invalid because it contains no sufficiently definite and certain standards of guilt	40
Point III. There was no evidence that appellant advocated the use of violence or other unlawful means; accordingly the statute as applied to him is invalid under the due process clause of the Fourteenth Amendment	47
Point IV. The Federal questions presented were properly raised in the court below, and this Court has jurisdiction on appeal	59
Conclusion	62
Appendix A	63

CITATIONS.

Cases.

PAGES

Abie State Bank v. *Bryan*, 282 U. S. 765 39
Abrams v. *United States*, 250 U. S. 616 17
American Surety Co. v. *Baldwin*, 287 U. S. 156 ..... 60, 61

Borden's Farm Products Co. v. *Baldwin*, 293 U. S. 194 19
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673 61

Carr v. *The State*, 176 Ga. 55 57
Carr v. *The State*, 176 Ga. 747 39
Chastleton Corp. v. *Sinclair*, 264 U. S. 543 38
Cline v. *Frink Dairy Co.*, 274 U. S. 445 44
Commercial Pub. Co. v. *Smith*, 149 Fed. 704 (C. C. A. 6th) 51
Commonwealth v. *Peaslee*, 177 Mass. 267 15
Connally v. *General Construction Co.*, 269 U. S. 385 ..... 44, 45
Czarra v. *Board of Medical Supervisors*, 25 App. D. C. 443 44

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282 62
Daniel v. *Moncure*, 58 Mont. 193 51
Debs v. *United States*, 249 U. S. 211 17
Dupont Engineering Co. v. *Nashville Banner Pub. Co.*, 13 F. (2d) 186 (D. C., M. D., Tenn.) 51

Ex parte Jackson, 45 Ark. 158 44

Fiske v. *Kansas*, 274 U. S. 380 ..... 12, 14, 47, 49, 58, 62
Flaks v. *Clark*, 143 Md. 377 51
Frohwerk v. *United States*, 249 U. S. 204 17

Gibson v. *State*, 38 Ga. 571 ..... 29n
Gilbert v. *Minnesota*, 254 U. S. 325 17
Gitlow v. *New York*, 268 U. S. 652 ..... 10, 11, 14, 18, 19, 20, 21, 23, 38
Grannis v. *Ordean*, 234 U. S. 385 61
Great Northern R. Co. v. *Sunburst Oil Ref. Co.*, 287 U. S. 358 61

PAGES

Halsey v. *New York Society*, 234 N. Y. 1 51
Hamilton v. *Regents*, 293 U. S. 245 14

International Harvester Co. v. *Kentucky*, 234 U. S. 216 43

Klaw v. *New York Press Co., Ltd.*, 137 App. Div. 686 .. 51

Lawrence v. *State Tax Commission*, 286 U. S. 276 61
Louisville & Nashville R. R. v. *Railroad Commission of Tennessee*, 19 Fed. 679 (C. C., M. D., Tenn.) 44
Louisville & N. R. Co. v. *Commonwealth*, 99 Ky. 132 44

McBoyle v. *United States*, 283 U. S. 25 46

Meyer v. *Nebraska*, 262 U. S. 390 ..... 14, 15, 19
Missouri v. *Gehner*, 281 U. S. 313 61
Moore v. *Booth*, 216 Mich. 653, 656 51

Nash v. *United States*, 229 U. S. 373 45
Near v. *Minnesota*, 283 U. S. 697 ..... 14, 15, 18, 56
Nebbia v. *New York*, 291 U. S. 502 15
New York Staats Zeitung v. *Nolan*, 89 N. J. Eq. 387 56

People v. *Gitlow*, 234 N. Y. 132 22
Pierce v. *United States*, 252 U. S. 239 17

Saunders v. *Shaw*, 244 U. S. 317 61
Schaefer v. *United States*, 251 U. S. 466 ..... 17, 51
Schenck v. *United States*, 249 U. S. 47 ..... 10, 11, 12, 14, 15, 16, 18, 19, 20, 21, 46, 59
Standard Chemicals & Metals Corp. v. *Waugh Chemical Corp.*, 231 N. Y. 51 44
State v. *Parker*, 183 Minn. 588 44
Stevens v. *Storke*, 191 Cal. 329 51
Stromberg v. *California*, 283 U. S. 359 14
Swift & Co. v. *United States*, 196 U. S. 375 15

Tozer v. *United States*, 52 Fed. 917 (C. C., E. D., Mo.) 44, 45

PAGES

United States v. *Capital Traction Co.*, 34 App. D. C. 592 44
United States v. *L. Cohen Grocery Co.*, 255 U. S. 81 42
United States v. *Cruikshank*, 92 U. S. 542 14
United States v. *Dennett*, 39 F. (2d) 564 (C. C. A. 2d) 50
United States v. *Macintosh*, 283 U. S. 605 18
United States v. *One Book Entitled Ulysses*, 72 F. (2d) 705 (C. C. A. 2nd) 50

Whitney v. *California*, 274 U. S. 357 ..... 10, 11, 14, 15, 16, 18, 19, 20, 21, 22, 23, 38, 39, 46

Constitutional Provisions and Statutes.

California Criminal Syndicalism Act (California Statutes, 1919, c. 188, pp. 281, 282) 19, 22
Capital Crimes Act (December 24, 1821, Prince's Digest, p. 799) 26n
Clayton's *Compilation of Laws of Georgia*, 1800-1810, page 178, #132 ..... 26n
Colonial Laws of New York (1896 ed.), I, 631, 761 ..... 24n

Digest of Georgia Laws, 1755-1800, Marbury & Crawford 25n

Espionage Act of June 15, 1917 (40 Stat. 217) 14, 17

Georgia Code of 1861, Sections 4214, 4704-4706 ..... 28n
Georgia Laws of 1871, pages 19, 20 ..... 29n

New York Criminal Anarchy Act (New York Laws of 1909, Ch. 88; New York Consolidated Laws, 1909, Ch. 40, originally passed in New York Laws of 1902, Ch. 371) 18

Penal Code of Georgia,
Section 55 ..... 3n
Section 56 ..... 2, 8, 9, 10, 13, 23
Section 57 ..... 3n

PAGES

Prince's *Digest of Laws of Georgia*, 1822, page 346 ..... 28n
Public Laws of Georgia, Penal Code, 1866, page 152, approved December 15, 1866 ..... 29n

United States Constitution,
First Amendment 14, 20
Thirteenth Amendment 29, 29n
Fourteenth Amendment 2, 9, 10, 11, 12, 13, 14, 15, 20, 40, 42, 47, 59
Eighteenth Amendment 52

Miscellaneous.

Aigler, *Legislation in Vague or General Terms*, 21 Mich. L. Rev. 831, 843, 848 44
Appleton's Annual Cyclopedia, 1865, page 627 ..... 35n
Avery, *History of Georgia*, page 353 ..... 36n, 37n

Beale, *Criminal Attempts*, 16 Harv. L. Rev. 491 15
Beale, *The Critical Year*, pages 155-6 ..... 38n
Brooks, *History of Georgia* 25n, 28n, 37n
Pages 324-7 ..... 36n
Pages 302, 321 ..... 37n

Brown, *Lower South in American History*, Ch. IV 36n

Chafee, *Freedom of Speech*, Ch. I 20
Confederate Records of Georgia, IV, edited by Candler,
Page 44, Governor's message of January 8, 1866 ..... 38n
Pages 97, 100, 294 ..... 37n
Pages 414-5 ..... 31n

Constitutional Convention of 1865 (*Journal*), pages 44 and 125 ..... 29n
Coulter's *Short History of Georgia* 25n
Pages 170-1, 284-5 ..... 27n
Page 286 ..... 28n
Page 330 ..... 36n
Pages 331-5 ..... 37n
Pages 342-3 ..... 30n, 31n

PAGES

Fleming, *Civil War and Reconstruction in Alabama*, 1865-6, page 383 ..... 35n

Fleming, *Documentary History of Reconstruction*,
Vol. I, Pages 195, 163-4, 243 ..... 30n
Vol. II, Page 3 ..... 36n
Page 327 ..... 36n
Page 344 ..... 35n
Page 360 ..... 35n

Flippin, *H. V. Johnson* 37n
Page 264 ff. 37n
Pages 270-1 ..... 30n

Free Negro Legislation in Georgia Before the Civil War, 16 Georgia Historical Quarterly 27 ff. (1932) 25n

Georgia Colonial Records, I, 31-62, 216. Acts of the Trustees 24n

Georgia Records XIX, Pt. I, pages 209-49 ..... 25n

Harris, *History of Georgia to Recent Times* (1896) 35n

Horsmanden's Account of Negro Conspiracy of 1741-2, N. Y. 1744, 400 pp. 24n

House Minority Report #121, 41st Congress, 2d Session, pages 47, 53 ..... 36n

House Misc. Doc., 41st Cong., 2d Session, page 482 ..... 35n

Indefinite Criteria of Definiteness in Statutes, 45 Harv. L. Rev. 160 45

Joint Committee on Reconstruction, 1866, pt. iii,
Pages 42, 46, 129 ..... 35n
Page 173 ..... 37n

Journal of the Constitutional Convention, 1865, page 174 ..... 31n

Journal of Georgia Senate, 1865-6 ..... 31n

PAGES

Journal of House of Representatives of Georgia,
Regular Session,
November 1, 1804, page 5 ——— 27n
December 10, 1804, page 48 ——— 27n
Extra Session,
May 14, 1804, page 14 ——— 27n
May 15, 1804, pages 18 and 19 ——— 27n
May 17, 1804, page 22 ——— 27n
May 19, 1804 ——— 27n

Journal of House of Representatives of Georgia,
1865-6, pages 21-3 ——— 31n

Journal of House of Representatives of Georgia,
1866, page 31, November 1, 1866 ——— 38n

Ku Klux Report (1871), Georgia Testimony of General Wright, 272, *ibid.*, Minority Rept., 441 ——— 36n

Lindley, *The Roosevelt Revolution* ——— 52

Macon Journal and Messenger, February 23, 1866 ——— 30n

Macon Telegraph,
May 24 and June 1, 1865 ——— 37n
December 1 and 30, 1865 ——— 36n
January 9, 1866 ——— 31n

Milledgville Federal Union,
January 2, 1866 ——— 38n
January 9, 1866 ——— 37n

New York City O. S. records, 1712 ——— 24n

New York Daily Tribune,
October 28, 1865 ——— 35n
December 2, 1865 ——— 35n
March 7, 1866 ——— 35n

New York Herald, May 20 and 21, 1865 ——— 36n
New York Nation, February 1, 1865 ——— 35n

PAGES

New York Times,
November 23, 1865 ..... 35n
December 11, 1865 ..... 36n
December 31, 1865 ..... 37n

New York Tribune,
September 4, 1865 ..... 36n
September 15, 1865 ..... 36n
December 7, 1865 ..... 31n
February 6, 1866 ..... 36n

Official Records of War of Rebellion,
Vol. XLVII, pt. iii, pages 595-6, 665-6 ..... 36n
Vol. XLIX, pt. ii, pages 1061-2 ..... 36n

Osgood, *History of American Colonies in 18th Century,* III,
Page 61 ff. 24n
Pages 61, 62 ..... 25n
Page 62 ..... 24n
Page 65 ..... 25n

Report of Commissioners on Freedmen's Code to Governor Jenkins, December 19, 1865 ..... 31n-34n

Report of Joint Committee on Reconstruction, 39th Congress, 1st Session, pt. iii 35n

Revolutionary Radicalism, The Report of the Joint Legislative Committee Investigating Seditious Activities, filed April 24, 1920, in the Senate of the State of New York, 4 vols. 22n

Savannah Herald, February 13, 1866 ..... 30n

Savannah National Republican,
September 21, 1865 ..... 35n
November 16, 1865 ..... 35n, 37n
November 23, 1865 ..... 31n
January 1, 3, 10, 12, 1866 ..... 38n
January 16, 1866 ..... 31n
Supplement, January 22, 1866 ..... 31n

PAGES

Sayre, *Criminal Attempts*, 41 Harv. L. Rev. 821 15
Senate Ex. Doc. #2, 39th Cong., 1st Sess., page 5 ..... 35n
Senate Ex. Doc. #43, 39th Cong., 1st Sess., page 4 ..... 35n
Senate Ex. Doc. #2, 39th Cong., 2nd Sess., page 54 ..... 30n
Senate Ex. Doc. #6, 39th Cong., 2nd Sess., page 55 ..... 35n

Senate Journal, Extra Session (1804),
May 17, page 7 ..... 27n
May 18 ..... 27n
May 19, page 9 ..... 27n

Stephenson & Fleming, *Confederacy and Reconstruction*,
Page 41 ..... 37n
Page 48 ..... 35n, 38n

Thompson, *History of Reconstruction in Georgia* 37n
Page 43 ..... 37n
Pages 116-117 ..... 38n
Pages 129-131 ..... 35n, 38n
Page 132 ..... 38n
Pages 148-9 ..... 30n
Page 157 ..... 30n, 31n
Pages 361-394 ..... 38n

Tillson, Report of Gen., Senate Ex. Doc. #2, 39th Cong., 2d Session, page 54 ..... 30n
Tillson, Report of Gen., Senate Ex. Doc. #6, 39th Cong., 2d Session, page 55 ..... 35n

Wall, *Carpet Bag Rule in Florida* 36n
Woolley, *Reconstruction in Georgia*, pages 17-8 ..... 37n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 665.

ANGELO HERNDON,

Appellant,

v.

THE STATE OF GEORGIA.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA.

BRIEF FOR THE APPELLANT.

Opinions Below.

No opinion was rendered by the trial court. Its charge to the jury appears at R., 126-137. The original opinion of the Supreme Court of Georgia (R., 141-179) is reported in 178 Ga. 832. Its opinion upon the denial of the petition for rehearing (R., 192-199) is reported in 179 Ga. 597.

Jurisdiction.

The judgment of the court below was entered May 24, 1934 (R., 179). The petition for rehearing (R., 182-191) was denied September 28, 1934 (R., 200). The petition for appeal was presented to the Chief Justice of the Supreme Court of Georgia and allowed by him December 19, 1934 (R., 200). This Court on February 11, 1935 reserved further consideration of the question of jurisdiction until the argument on the merits.

Questions Presented.

1. Whether Section 56 of the Penal Code of Georgia, as construed by the Supreme Court of Georgia, unreasonably restricts appellant's freedom of speech and of assembly and is therefore invalid under the due process clause of the Fourteenth Amendment.

2. Whether Section 56 of the Penal Code of Georgia, as construed by the Supreme Court of Georgia, contains a standard of guilt which is so vague and uncertain that it is not susceptible of reasonable application and therefore is invalid under the due process clause of the Fourteenth Amendment.

3. Whether Section 56 of the Penal Code of Georgia, as applied by the Supreme Court of Georgia, deprived appellant of his liberty without due process of law in violation of the Fourteenth Amendment.

4. Whether this Court has jurisdiction on this appeal.

Statute Involved.

Section 56 of the Penal Code of Georgia (Georgia Acts, 1871-1872, pp. 19-20) provides:

"Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection."[1]

Statement.

Appellant, a young Negro, was convicted of violating Section 56 of the Penal Code of Georgia. As a result of a recommendation of mercy by the jury he escaped the death penalty and was sentenced to eighteen to twenty years in the penitentiary (R., 9). The facts surrounding his arrest and conviction were as follows:

On July 11, 1932 (R., 73), appellant was arrested without a warrant as he opened his mail box, No. 339 in the Federal Post Office Building in Atlanta, Georgia (R., 56), with the key in his possession. Upon instructions of Assistant Solicitor General Stephens the police had been lying in wait for anyone who came to the box because a Commissioner had complained about receiving a "scurrilous" letter bearing that box number (R., 60). The alleged letter was never offered in evidence, nor were its contents divulged.

---

[1]The punishment for an attempt to incite insurrection is contained in Section 57 of the Penal Code (Acts, 1866, pp. 152, 153, as amended by Acts, 1871, pp. 19-20) which is as follows:

"Any person convicted of the offense of insurrection, or an attempt to incite insurrection, shall be punished with death; or, if the jury recommend to mercy, confinement in the penitentiary for not less than five nor more than twenty years."

Insurrection is defined in Section 55 of the Penal Code (Acts, 1866, pp. 152-153), as follows:

"Insurrection shall consist in any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested, or intended to be manifested, by acts of violence."

No charge of any kind was made against appellant until eleven days after his arrest when a writ of habeas corpus was sued out to effect his release (R., 73-74). The court said upon the hearing of the writ that appellant would be released on the following day unless an indictment should be obtained. Appellant was indicted on July 22, 1932, for attempting on July 16, 1932, to incite insurrection in violation of Section 56 of the Georgia Penal Code (R., 5). On July 16, 1932 appellant was in jail as he had been for some days before (R., 73).

The evidence introduced against appellant at the trial consisted of the testimony of three witnesses and certain documents, some of which stated the position of the Communist Party on various questions. Some of these documents were in a box under appellant's arm at the time of his arrest; the remainder were found in his room when he was forced by the arresting officers to conduct them to his lodging house where his room was searched without a warrant (R., 56-8). The three State witnesses were Watson, the arresting officer (R., 56-8, 59-60, 65-8), Clonts, a clerk in the post office (R., 58-9), and Assistant Solicitor General Stephens (R., 60-4). Clonts' testimony concerned only the identity of appellant as lessee of the post office box which he was opening at the time of his arrest. Watson and Stephens identified the documents in evidence as taken from appellant's person or his room. Both testified that after appellant's arrest he had stated that he was an organizer for the Communist Party, and Stephens testified that appellant had described his duties as an organizer: "* * * to call meetings, educate or disseminate information regarding the party at these meetings, to distribute literature, to secure members for the organization and generally to work up an organization of the Communist Party in Atlanta" (R., 61). Stephens further testified that appellant had stated that he had held or had attended two or three meetings. He also testified that appellant had said that there were only five or six actual members of the Com-

munist Party in Atlanta, some of whose names were given (R., 62, 63). Neither Watson nor Stephens testified to further knowledge of any offense or activities of appellant.[3] Stephens' only other contribution to the State's case was his testimony that appellant had stated that he was the author of one or two of the documents in evidence (R., 62-63, apparently referring to Nos. 30 and 31; R., 123-6); they were the documents characterized by the court below as "more or less harmless" (R., 166).

Documents seized by the police officers which make up the balance of the State's evidence, consist in part of literature published in the interests of the Communist Party and one or more books of radical economic character, apparently used only for appellant's own perusal.[4]

The only documents which there was evidence that appellant distributed were the two "more or less harmless" ones mentioned above. Of the remaining documents, thirteen were mentioned in the original opinion of the court below and may thus be assumed to have influenced the decision. Nine of these thirteen were membership books of the Communist Party (Nos. 3 to 11, R., 93-9), which contained a general description of the Communist Party, its aims and purposes. Three of the thirteen documents, "The Communist Position on the Negro Question" (No. 13, R., 102), "An Appeal to Southern Young Workers" (No. 16, R., 112), and "Party Organizer" (No. 17, R., 113), were Communist publications containing Party propa-

---

[3]Neither had seen appellant before his arrest nor had any personal knowledge of his previous activities (R., 56-8, 64). Watson testified that when he went to the post office box he did not know whom he was going to arrest; that he had not seen appellant circulate or distribute any of the documentary evidence; that he had never seen appellant resist an arrest or combine with others in resistance to the State government (R., 57-8, 65).

[4]Copies of the Bible, the "Atlanta Constitution" and other literature found in appellant's possession were not offered in evidence by the State (R., 66-7).

ganda. The other document relied on by the court below, a book entitled "Communism and Christianism" (No. 15, R., 112), was not shown to have any connection with the Communist Party and was apparently mere personal reading matter.[4] The documents which had some connection with the Communist Party expound and advocate the general aims of that Party, such as unity of all workers and organization to improve the conditions of the working class. They advocate certain specific measures such as equal political and economic rights of Negroes, self-determination for the Black Belt, punishment of lynchers, disbanding of military units, abolition of child labor, minimum wages, maximum working hours, strikes and boycotts. None of the documents advocated forcible resistance to the authority of the State.

At the trial appellant made a statement to the court (R., 70-8) in which he set forth, among other things, his belief as to the real reason for his arrest[5]. In the course

---

[4]There was no evidence that this book had been distributed by appellant or that it had been received by him from Party headquarters. The record shows that the volume contained 247 pages (R., 112). It is unreasonable to suppose that he had received a volume of this size for distribution.

Despite the statement in the original opinion of the court below indicating that the word "violence" appears frequently in the documentary evidence (R., 177), the fact is that the only use of the word in all of the documentary evidence is in "Communism and Christianism", in a context which shows that it was not a word of incitation.

[5]In the middle of June, 1932, relief agencies and the city government of Atlanta had stopped furnishing relief (R., 70). The Unemployed Council of Atlanta, connected with the Unemployed Committees of the United States followed the policy of its affiliate in organizing the impecunious black and white workers so that they might make a united appeal for relief. The Unemployed Council issued leaflets (Documents 30 and 31, R., 123-6) calling on workers to attend a demonstration at the courthouse. This fol-

(*Footnote continued on next page.*)

of this statement he expressed his judgment that "the system we are living under is on the verge of collapse" and that the unemployed have a right to demand food and shelter from the government. Nothing in the statement indicated that he had urged others to resist the authority of the State. Thus, all of the evidence at the trial established only that Herndon had admitted being an organizer for the Communist Party and that he had in his possession the documents which have been described above and the other documents in the record.

At the conclusion of the evidence the trial court charged the jury, in part, as follows:

> "• • • • that advocacy, however reprehensible morally, is not sufficient to convict the defendant where there is no evidence to indicate that the advocacy would be acted upon immediately. In order to convict the defendant, gentlemen, it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or was advocated" (R., 133).

The jury returned a verdict of guilty but recommended mercy, fixing the penalty at from eighteen to twenty years in the penitentiary (R., 9), and sentence was passed accordingly (R., 139). A motion for a new trial (R., 13, 14-40) was denied by the trial court (R., 40).

(*Footnote continued from previous page.*)

lowed a statement of the County Commissioners that no one was starving in Atlanta. The meeting was held to show that there was actual starvation and that the people who attended, both Negro and white, were half naked and starved (R., 72). Some of the white workers were permitted to go into the courthouse to see the County Commissioners, but the Negroes were excluded (R., 72). Although the County Commissioners had previously stated that they had no funds available for relief, they voted $6,000 for unemployment relief on the day after the demonstration (R., 73).

On writ of error the court below impliedly rejected the trial court's construction of the statute requiring that "immediate serious violence against the State of Georgia was to be expected or was advocated"; and instead, in its original opinion, construed Section 56 of the Georgia Penal Code to make criminal all attempts to persuade others to combine in forcible resistance to the State, no matter how remote the time when it is advocated or intended that force should be employed, and no matter how unlikely it is that the attempted persuasion will lead to acts which are unlawful or which threaten the sovereignty of the State[6]. The evidence was held sufficient to sustain the judgment of conviction under the statute as thus construed[7]. Upon rehearing, the court below adopted the following modified construction:

> "'Force must have been contemplated, but the statute does not include either its occurrence or its imminence

---

[6]In this connection the court said:

> "* * * It is immaterial whether the authority of the State was in danger of being subverted or that an insurrection actually occurred or was impending. * * * Force must have been contemplated, but, as said above, the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. * * * Nor, would it be necessary to guilt, that the alleged offender should have intended that an insurrection should follow instantly or at any give[n] time, but it would be sufficient that he intended it to happen at any time, as a result of his influence, by those whom he sought to incite * * *" (R., 164-5).

[7]The original construction of the statute by the court below was in connection with its consideration of the question whether the evidence was sufficient to support the verdict. Before embarking on the discussion of the construction, the court below said in its original opinion:

> "Before proceeding to examine the evidence, however, it is proper to determine the exact nature of the offense alleged to have been committed" (R., 163).

as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce" (R., 196).

Upon the basis of this modified construction, the court below again evaluated the evidence and concluded that it supported the judgment of conviction (R., 196).

The appeal is taken from the original judgment of affirmance and the order denying the motion for rehearing (R., 179, 200).

Specification of Errors to Be Urged.

1. The court below erred in holding that Section 56 of the Penal Code of Georgia, as construed by it, did not deprive appellant of his liberty, without due process of law, in violation of the Fourteenth Amendment.

2. The court below erred in holding that the application of Section 56 of the Penal Code of Georgia, as construed by it, did not deprive appellant of his liberty, without due process of law, in violation of the Fourteenth Amendment.

3. The court below erred in holding that Section 56 of the Penal Code of Georgia, as construed by it, was not so uncertain as to violate appellant's constitutional rights under the due process clause of the Fourteenth Amendment.

4. The court below erred in holding that Section 56 of the Penal Code of Georgia, as construed by it, was not so uncertain that its application to appellant violated his constitutional rights under the due process clause of the Fourteenth Amendment.

5. The court below erred in holding that appellant's conviction under Section 56 of the Penal Code of Georgia did not deprive him of his liberty without due process of law, in violation of the Fourteenth Amendment.

6. The court below erred in affirming the judgment of conviction.

SUMMARY OF ARGUMENT.

I.

Section 56 of the Georgia Penal Code as finally interpreted by the court below on rehearing does not require that the conduct which it proscribes shall give rise to any clear and present danger to the authority of the State. The statute thus contravenes the test laid down in *Schenck* v. *United States*, 249 U. S. 47. The requirement that conduct, to be punished validly, must give rise to a clear and present danger, is necessary to protect and reconcile the undoubted right of the State to repel violent assault upon its sovereignty and the equally clear rights of freedom of speech and assembly guaranteed by the Fourteenth Amendment.

The authority of the *Schenck* case has not been substantially impaired by later decisions. In *Gitlow* v. *New York*, 268 U. S. 652, and *Whitney* v. *California*, 274 U. S. 357, the Court considered the validity of statutes punishing advocacy of particular defined doctrine. In upholding the statutes in those cases, the Court relied on the familiar presumption of validity in the absence of proof that the regulations involved were unreasonable. In the *Gitlow* case, the Court distinguished between statutes proscribing particular expressions of doctrine and those which do not, recognizing that in the second class of cases it is necessary to determine, as an original question, whether the conduct in a particular case so endangers the safety of the State that it may be punished. It held that the test laid down in the *Schenck* case applied to cases in the latter class. The *Whitney* case did not disturb this distinction

and recognized that the validity of such statutes depends on their reasonableness.

The present statute is in the class to which the Court in the *Gitlow* case held that the test of the *Schenck* case should be applied. Examination of its background and history shows that it was passed in substantially its present form in 1866, that its progenitors were aimed at conduct resulting in slave insurrections; that, at the time of its passage in 1866, temporary conditions arising out of emancipation and other post-war disturbances gave concern to the Legislature; that those conditions disappeared with the restoration of tranquil relationships after the War, and that, therefore, there is no basis for concluding that the statute was aimed at conduct like appellant's. The statute finds no support in the presumption of validity applied in the *Gitlow* and *Whitney* cases. The apparent failure to use the present statute (with one exception) between 1866 and appellant's indictment, indicates the disappearance of conditions existing at the time of its passage and recognition that it was not designed to deal with others. Conditions in Georgia, which the Court may notice, negative the existence of any clear and present danger to the authority of the State arising out of activities connected with the organization of the Communist Party in Georgia.

Under these circumstances the statute cannot be regarded as a reasonable exercise of the State's police power to protect itself against violence and it is therefore invalid, under the Fourteenth Amendment.

II.

The statute as construed below eliminates the imminence or occurrence of force as an ingredient and requires only that a defendant should intend that force should be used "at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action". The standard of liability embodied in the statute as thus construed is so indefinite that it contravenes

the due process clause of the Fourteenth Amendment. Consideration of the matters upon which a jury would have to speculate to reach a conclusion about the probable intent of a defendant, demonstrates that they are left without any definite standard to apply. In such a case as the present (assuming, contrary to the fact, that appellant had intended that force should be used at some time), the jury would be required, among other things, to predict what action would be taken in the future by the leaders of the Communist Party and how long it would take, under changing conditions, to organize a sufficient number of Party members in Georgia and the other Southern States to justify an attempt to put the Party program into effect. To reach such a conclusion, they would be required to imagine a different community both in Georgia and elsewhere, and the trajectory of the defendant's influence in such hypothetical communities. Common experience could supply no guide. Due process denies clairvoyance so major a role in determining liability. Many cases establish that statutes containing standards so indefinite, and failing to give fair warning of their scope, violate the due process clause. The test laid down in the *Schenck* case is not open to these objections.

III.

Unless appellant urged that force be employed to achieve the reforms which he advocated, the statute is invalid as applied to him. Examination of the evidence discloses no advocacy of the use of force by appellant. The program of the Communist Party set forth in some of the documentary evidence, does not require the use of violence and contains affirmative indications that force would not be employed. The program could be put into effect without the use of force by those favoring it. The possibility of violent resistance to the program does not justify the application of the statute to appellant. The evidence in *Fiske* v. *Kansas*, 274 U. S. 380, was at least as strong as

that against appellant, and that case requires decision here that the application of the present statute to appellant was invalid.

IV.

The constitutional questions presented are within this Court's jurisdiction. They arose from the unanticipated act of the court below in construing the statute as laying down a standard of liability fundamentally different from that laid down in the statute as construed by the trial court. The questions were properly presented to the court below upon petition for rehearing. Failure of that court to consider them effectively denied the constitutional rights asserted. Accordingly, the questions are properly before this Court upon appeal.

POINT I.

The statute, as construed by the court below, is invalid because it unreasonably restricts the liberty of speech and assembly guaranteed by the Fourteenth Amendment.

Section 56 of the Penal Code of Georgia, as construed by the court below in its opinion upon rehearing, makes criminal all attempts to induce others to combine in forcible resistance to the authority of the State. It is immaterial whether force was actually employed, whether there was intent or inducement that it should be employed immediately or in the near future, and whether there was any probability that it would be employed at all. The statute requires only that the defendant must have intended that those whom he attempted to persuade should resort to forcible resistance at a time "within which he might reasonably expect his influence to continue to be directly operative" in causing them to do so. Advocacy of forcible resistance is thus made criminal, however remote the time when force is to be used, if the defendant might reasonably expect his persuasion to have some part in its eventual occurrence. Not only is there no requirement of a clear and present

danger to the authority of the State arising from a defendant's conduct or from the behaviour which he advocates, there is no necessity that there be any danger whatever.

As thus construed, the statute is clearly void under the test adopted by this Court in *Schenck* v. *United States*, 249 U. S. 47, to define the maximum limitation on freedom of speech permissible under the First Amendment. In that case the Court considered the validity of the Espionage Act of June 15, 1917 (40 Stat. 217) and of its application. Recognizing the power of Congress, through the exercise of its war powers, to prevent the substantive evils which might be brought about by unabridged freedom of speech or of the press during the progress of the War (and that limitations upon these liberties, necessary in time of war, might not be permissible in time of peace) the Court said (p. 52):

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

We contend that this test should be applied to the present statute under the Fourteenth Amendment, and that, if applied, the statute is necessarily invalid.

Freedom of speech and assembly are comprehended within the liberty guaranteed by the due process clause of the Fourteenth Amendment. See *Near* v. *Minnesota*, 283 U. S. 697, 707; *Stromberg* v. *California*, 283 U. S. 359, 368; *Whitney* v. *California*, 274 U. S. 357, 362, 371, 373; *Fiske* v. *Kansas*, 274 U. S. 380, 382; *Gitlow* v. *New York*, 268 U. S. 652, 666; *Hamilton* v. *Regents*, 293 U. S. 245; cf. *Meyer* v. *Nebraska*, 262 U. S. 390, 399; *United States* v. *Cruikshank*, 92 U. S. 542, 551. Limitations upon the liberty of expression guaranteed by the Fourteenth Amendment have been recognized only in exceptional cases. *Near* v. *Minnesota, supra*, at page 716.

The right of the States to protect themselves against direct incitements to acts of violence and against conduct

which creates grave danger that the government will be overthrown by force, is beyond question. *Near* v. *Minnesota, supra,* at page 716. The permissible scope of the exercise of that right must be measured by the same tests which are applied in determining the validity of other statutes having legitimate ends, that is that "the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objects sought to be attained" (See *Nebbia* v. *New York,* 291 U. S. 502, 525; *Meyer* v. *Nebraska, supra,* p. 400; *Whitney* v. *California, supra,* p. 371). We maintain that in limiting the liberty of speech and of assembly guaranteed by the Fourteenth Amendment beyond the point permitted by the test laid down in the *Schenck* case, the present statute is so unreasonable and arbitrary as to violate the Fourteenth Amendment. To suppress all advocacy of change which may be deemed to involve the use of force at some indefinite future time, is a means far better adapted to eliminating the formation of all assemblies for political discussion than to protecting the State against violence. So unnecessarily extensive an infringement of freedom is unreasonable as a means of deterring violence. Moreover, when the avoidance of violence is so exalted at the expense of freedom of expression, there is room for doubt whether the true end of the statute was not the suppression of freedom, which is not a permissible end.

The test adopted by the Court in the *Schenck* case, *supra,* applies a principle analogous to that found in the law of criminal attempts and elsewhere in the criminal law to mark the point at which the danger of violence has been thought to outweigh the danger of trying "the thought of man". See *Commonwealth* v. *Peaslee,* 177 Mass. 267, 272; *Swift & Co.* v. *United States,* 196 U. S. 375, 396; Beale, *Criminal Attempts,* 16 Harv. L. Rev. 491; Sayre, *Criminal Attempts,* 41 Harv. L. Rev. 821. If there is imperfection in the analogy it springs from the inestimably greater danger to a democracy in curtailing the political freedom at which the present statute is directed than in the limita-

tion of freedom involved in punishing an incipient attempt to commit a common crime.

The test laid down in the *Schenck* case reconciles the right of the State to protect itself against violence and the right of the individual to free political discussion and organization, and prevents improper abridgement of either right. The test is a practicable and workable one; it is easy for courts and juries to apply. Other possible tests extending the right of the State beyond protecting itself against the threat of immediate violence end in vague but dangerous trespasses upon liberties guaranteed by the Constitution.

The constitutional justification for the test of the *Schenck* case was well stated by Mr. Justice Brandeis in his concurring opinion (with Mr. Justice Holmes) in *Whitney* v. *California, supra,* at pages 376-377:

> "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. * * * In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.
>
> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the proc-

esses of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution."

The continued vitality of the decision in the *Schenck* case, and the test there laid down, do not seem to us to have been substantially affected by subsequent decisions of this Court. Its authority was recognized in all of the later cases arising under the Espionage Act. See *Debs* v. *United States*, 249 U. S. 211; *Frohwerk* v. *United States*, 249 U. S. 204; *Abrams* v. *United States*, 250 U. S. 616; *Schaefer* v. *United States*, 251 U. S. 466; *Pierce* v. *United States*, 252 U. S. 239, and cf. *Gilbert* v. *Minnesota*, 254 U. S. 325.

While in some of these cases the Court stated the rule to be applied, in appraising the evidence upon which conviction was based, in somewhat different words from those used in stating the test in the *Schenck* case, its continued authority was recognized and no attempt was made to limit the application of the test which it lays down. Dissents in some of these cases showed division upon the application of the Espionage Act to the facts in the particular cases, with possibly some apprehension on the part of the dissenting Justices that, in the application in the particular cases, the test of the *Schenck* case was not being applied as rigorously as it should be. But nothing explicitly said or held in those cases gives reason to doubt its continued recognition by the Court. Cases arising under the Espionage Act dealt with conduct occurring during the supreme emergency of war, and the Court recognized in

the *Schenck* case as it has since (see *United States* v. *Macintosh*, 283 U. S. 605, 622; *Near* v. *Minnesota*, *supra*, at p. 716), that the exigencies of war may justify restrictions of freedom which would be intolerable in time of peace.

Gitlow v. *New York*, 268 U. S. 652, *supra*, and *Whitney* v. *California*, 274 U. S. 357, *supra*, somewhat limited the application of the test laid down in the *Schenck* case but otherwise they left it unimpaired. In the *Gitlow* case the Court considered the validity of the New York Criminal Anarchy Act (New York Laws of 1909, Ch. 88; New York Consolidated Laws, 1909, Ch. 40, originally passed in New York Laws of 1902, Ch. 371) as construed and applied to the facts of that case. The statute defined with particularity the nature of the doctrine, advocacy of which was denounced. In the absence of any showing that the Court should not indulge the familiar presumption of the existence of facts which would support the statute, the Court relied upon the legislative determination that advocacy of the defined doctrine involved grave danger to the safety of the State; accordingly it sustained the validity of the statute and found that there was adequate evidence to justify its application. The Court pointed out the difference between a statute of that kind and one which merely prohibited certain acts involving the danger of substantive evil, saying (pp. 670-671):

> "It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any

previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection."

The Court for the first time declared that the test laid down in the *Schenck* case was intended to apply only to cases where the statute did not involve a previous valid determination by the legislative body as to the evil consequences of the advocacy of doctrine. The minority (Mr. Justice Brandeis and Mr. Justice Holmes) did not concur in the distinction made by the majority as to the scope of its application.

The Court assimilated the presumption of constitutionality upon which it relied to the similar presumption ordinarily indulged in considering legislation (*Gitlow* v. *New York, supra,* p. 668). The presumption is one of fact which is rebuttable (*Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 209; cf. *Meyer* v. *Nebraska, supra,* at p. 400); but in the *Gitlow* case there appear to have been no facts in the record or which the Court could notice, to rebut the presumption.

Similarly, in *Whitney* v. *California, supra,* the Court upheld the California Criminal Syndicalism Act (California Statutes, 1919, c. 188, p. 281), which meticulously defined criminal syndicalism and denounced the formation and participation in the work of organizations advocating criminal syndicalism. The legislature had expressly determined that the conduct at which the Act was aimed involved immediate danger to the public peace and security of the State. The Court also considered that there was sufficient evidence to justify application of the statute to Miss Whitney. Mr. Justice Brandeis and Mr. Justice Holmes concurred because there was some evidence which might have justified the trial court in finding the existence of a clear and present danger to the authority of the State arising from conspiracy by members of the Interna-

tional Workers of the World to "commit present serious crimes" and because objections urged in this Court had not been properly made below. The majority of the Court did not discuss the *Schenck* case, although by reference to the *Gitlow* case (p. 371) "and cases cited" it may perhaps be assumed that it reaffirmed its position in the *Gitlow* case with respect to the *Schenck* case.

In neither the *Whitney* nor the *Gitlow* cases, as we read them, did the Court intimate any belief that persons were subject to punishment for utterances which did not constitute a clear and present danger to the safety of the community. Both cases referred to the doctrine, which is not questioned here, that a State may validly punish those whose utterances are inimical to the public welfare because they incite to crime, disturb the public peace, or endanger the foundations of organized government by threatening its overthrow by unlawful means. But at no point has this Court suggested that a State may, under the guise of exercising its police power, interfere with the liberty of the citizen guaranteed by the Fourteenth Amendment by legislation aimed merely at undesired tendencies, as opposed to conduct directly leading to substantive evils.

Such extension of a State's power, if it had been countenanced by this Court, would necessarily have involved a decision that the Fourteenth Amendment and, indirectly, the First, adopted the English law of seditious libel, which is foreign to our traditions and destructive of the liberties guaranteed by these Amendments. Chafee, *Freedom of Speech*, Ch. I, contains the applicable authorities demonstrating that the English law of seditious libel was not approved by the Framers, but on the contrary was considered inappropriate in this Republic, as it soon was in England. Conceiving it to be impossible that the *Gitlow* and *Whitney* cases can be extended so far, we deem it unnecessary to discuss the matter at length in this brief.

The Georgia statute under which appellant was convicted cannot, for reasons stated above, be sustained if its validity is tested by the rules laid down in the *Schenck*

case. Nor can it be considered upon the assumption that it contains a legislative finding that activities designed to obtain members for the Communist Party are so likely to result in violence as to be dangerous to the authority of the State. The present statute does not define doctrine, the advocacy of which is deemed noxious to the safety of the State; it proscribes acts "involving the danger of substantive evil", without any reference to the language itself (*Gitlow* v. *New York, supra,* p. 670). Thus, it falls into the class of cases which the Court held, in the *Gitlow* case (p. 671), require determination "as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection". The inquiry required under the *Gitlow* and *Schenck* cases was left open by the trial court's interpretation of the statute, but was necessarily excluded by the construction of the statute by the court below. Since the statute as construed below makes immaterial to its application the inquiry which this Court has held to be necessary to due process, it is necessarily invalid.

Moreover, even if the statute should be regarded as analogous to those dealt with in the *Gitlow* and *Whitney* cases, *supra,* the absence (and indeed the impossibility) of any indication that the Georgia statute was aimed at persons engaged in activities like those for which appellant was convicted, would require a different result in this case from that reached in those cases.

The statute considered in the *Gitlow* case was originally adopted in 1902, shortly after the assassination of President McKinley by an anarchist. It was applied in a period of post-war emergency, when feelings were aroused and revolutionary stirrings were felt throughout the world, to the advocacy of doctrine of the same general kind as that found by the Legislature to constitute a menace to the stability of the State (cf. the majority and dissenting

opinions in *People* v. *Gitlow*, 234 N. Y. 132). At the time of Gitlow's indictment, the Legislature not only continued to recognize the existing danger of the substantive evil denounced in the statute, but it was earnestly considering further legislation of the same general character.[8] The record contained no evidence rebutting the legislative finding.

The California statute upheld in the *Whitney* case, *supra*, contained the following provision:

> "Sec. 4. Inasmuch as this Act concerns and is necessary to the immediate preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place in this State advocating, teaching and practising criminal syndicalism, this Act shall take effect

---

[8]At about the same time, the New York Legislature, by concurrent resolutions, provided for a committee to investigate seditious activities. The preamble to the resolution contained the following:

> "WHEREAS, it is a matter of public knowledge that there is a large number of persons within the State of New York engaged in circulating propaganda calculated to set in motion forces to overthrow the government of this State and the United States, and
>
> WHEREAS, sufficient facts were adduced by the sub-committee of the Senate of the United States investigating this subject during the last session of Congress, to indicate the necessity of further inquiry and action, and
>
> WHEREAS, it is the duty of the Legislature of the State of New York to learn the whole truth regarding these seditious activities, and to pass, when such truth is ascertained, such legislation as may be necessary to protect the government of the State and to insure the maintenance of the rights of its citizens, * * *." (See *Revolutionary Radicalism*, The Report of the Joint Legislative Committee Investigating Seditious Activities, filed April 24, 1920, in the Senate of the State of New York, 4 vols.)

upon approval by the Governor." (California Statutes, 1919, Ch. 188, p. 282; see concurring opinion of Brandeis, J., in *Whitney* v. *California, supra,* p. 378.)

In both the *Gitlow* and *Whitney* cases, the Court was dealing with statutes which found support in a legislative belief (whose basis was not shown to have been unreasonable) that the conduct to which they were applied involved a grave danger of substantive evil threatening the safety of the State. There was no perversion of those statutes, as construed here, from their original purpose to a purpose which was not, and could not have been, in the mind of the Legislature at the time the statutes were adopted.

Consideration of the history of Section 56 of the Georgia Penal Code and its progenitors, demonstrates that it was not aimed at conduct like that for which appellant was convicted; on the contrary, it was designed to deal with quite different activities which have long ceased to menace the safety of the State, leaving the statute in a condition of desuetude until it was resurrected in another case shortly before the law was applied to appellant in circumstances which could not have been contemplated at the time of its passage.

The predecessors of Section 56 of the Georgia Penal Code were aimed at activities designed to create rebellion among slaves; that was a danger of a particular kind, to be understood in the light of the history of Georgia and other States concerned by the same problem. The present statute, in substantially its present form, was passed in 1866 to deal with analogous dangers arising out of post-war conditions, and it now remains as a vestigial reminder of conditions long since banished.

Before the American Revolution, a general fear of slave insurrection was felt in practically all slave-holding colonies, especially during periods of warfare and political stress. Thus, in colonial New York, statutes were passed

in 1708[9] and 1712[10] to prevent and punish slave insurrections and conspiracies. Slave scares in 1712[11] and 1741[12] led, in New York City, to the wholesale execution[13] of Negroes and of their white abettors, and involved the most cruel punishments.[14]

Georgia was established in 1732 by a body of philanthropists as a charitable enterprise for poor British subjects and as an English frontier.[15] Inconsistent as it may have been with the British colonial system,[16] slavery was forbidden.[17] Slavery would have been uncongenial to the system of small tenant farming which existed early in Georgia's history, and the presence of slaves would have been a source of weakness in a frontier community. Danger from Spain, from Indians and from lawless frontiersmen, made slave insurrections particularly menacing because

---

[9]I, *Colonial Laws of N. Y.*, 631 (1896 ed.). Justices of the Peace could impose death as a penalty after summary trial without a jury.

[10]I, *Col. Laws, N. Y.*, 761 (1896 ed.). Whipping was provided as the penalty for unlawful assembly of Negroes, for assaulting a white person, or for gaming. Summary trial and death was provided for murder, arson, rape, mayhem and insurrection. Whipping or fines were the penalties for whites who entertained or gave drink to Negroes.

[11]*New York City O. S. records*, 1712.

[12]*Judge Horsmanden's Account of Negro Conspiracy of* 1741-2, N. Y. 1744, 400 pp.

[13]More than fifty in New York City in 1712. In 1741 one hundred and twenty-five Negroes and two whites in New York City.

[14]The stake, the rack, hanging in chains and quartering were among them.

[15]Osgood, *"History of American Colonies in 18th Century"*, III, 62.

[16]Osgood, *Ibid.*, III, 61 ff.

[17]*Georgia Colonial Records*, I. 31-62, 216. Acts of the Trustees.

of the ease "with which a hostile state might be able to encourage such uprisings."[18]

But pressure for slavery soon began to be exerted by the settlers themselves, and, in 1750, the Trustees passed an act allowing slaves in strictly limited numbers.[19] With the conflict between the desire for slaves and fear of the consequences of their presence, it was natural that colonial legislation should regulate slaves very carefully. In 1765, 1770 and 1773, various acts of the colonial legislature prescribed lashing as the punishment for unlawful assembly of slaves, and death without benefit of clergy for aiding runaway slaves and for the second offense of striking a white man.[20]

Acceptance of slavery as a natural part of the economic system in Georgia followed the widespread growth of cotton cultivation after the first third of the nineteenth century.[21] Georgia forbade the slave trade by statute and in its constitution before 1800.[22] Not only slaves, but free Negroes as well, were closely regulated. Free Negroes, regarded as possible inciters of insurrection, were not encouraged to come into or stay in Georgia,[23] and no dis-

---

[18]Osgood, *loc. cit.* III, 61, 62.

[19]Osgood, *loc. cit.* III, 65.

[20]*Ga. Recs.* XIX, Pt. I, pages 209-49. *Digest of Georgia Laws*, 1755-1800, Marbury & Crawford. Punishment of free Negroes by fine was provided for aiding a runaway.

[21]Coulter's *Short History of Georgia;* R. P. Brooks, *History of Georgia.*

[22]Statutes in 1793 and 1798. Coulter, *op. cit.*

[23]16 Ga. Hist. Quarterly 27 ff. (1932), *Free Negro Legislation in Georgia before the Civil War* contains an excellent resumé of all statutes against free Negroes. Free Negroes were forbidden to enter in 1818; those in the State were to be registered, and undesirable ones were banished. Ships carrying free Negroes were quarantined in 1829. In 1859 the penalty for free Negroes entering the State was slavery. Free Negroes were not to carry firearms, read, write, set type or practice medicine. In 1835 fining and whipping was the penalty imposed on free Negroes who aided slaves.

tinction was made between crimes committed by free Negroes and slaves.[24]

Against this background, the progenitor of the present insurrection law of Georgia was passed on May 19, 1804, to prevent the insurrection of slaves. Any incitement to insurrection of slaves was a felony punishable by death without benefit of clergy. The delivery and publication of incendiary speeches were felonies punishable by banishment.[25]

---

[24]Thus, in 1821, in *Capital Crimes Act* (Dec. 24, *Prince's Digest*, p. 799), death was the penalty for free Negroes or slaves committing rape, murder, insurrection or attempted insurrection. Courts could sentence free Negroes or slaves to death in their discretion for assault with murderous intent, mayhem and burglary accompanied by arson. Laws, 1829, page 172, adds malicious burning.

[25]Clayton's *Compilation of Laws of Georgia*, 1800-1810, page 178, #132. The relevant provisions were:

"Sec. 1. Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, and it is enacted by the authority of the same. That from and after the passing of this act, if any person or persons shall raise or attempt or endeavour to raise any insurrection of slaves, or shall counsel, advise, aid or abet any such insurrection, or shall excite, promote, instigate or stir up or endeavor to excite, promote, instigate, or stir up any such insurrection, every person or persons so offending, shall on conviction thereof, be adjudged guilty of felony, and shall suffer death without benefit of clergy.

Sec. 2. And be it further enacted. That if any person or persons, shall hold any discourse of conversation with any slave or slaves, and shall make or deliver, or cause, or procure to be made, or delivered to any slave or slaves, any discourse, speech, harangue or talk tending to excite such slave or slaves to sedition, tumult or disorder, or write, or print, or publish any such discourse, speech, harangue or talk; every person or persons so offending, shall on conviction thereof, be declared guilty of felony, and banished this state forever. And if any such person or persons shall at any time after being so convicted and banished, return to and be found at large within the limits of this state, he, or they so returning, shall suffer death without benefit of clergy."

Passage of the statute in 1804 was primarily dictated by the fear that free Negroes, lawless frontiersmen, avid land grabbers, Spanish invaders from Florida or hostile Indians, would arouse the already too quickly-growing slave population to insurrection, and thus create a dangerous enemy behind the lines in time of foreign war or civil disturbance.[26] Border warfare was going on between Georgians and North Carolinians over a disputed boundary.[27] Militia had to be ordered out seven months after enactment of this statute to prevent the landing of French Negro brigands.[28] But the immediate circumstance giving rise to the passage of this Act lay in the conduct of a Superior Court Judge of Eastern Georgia, who was removed from office for an attempt to "excite insurrection by holding converse with slaves, tending to inflame their minds, threatening to head such insurrection himself and destroy all the white people".[29]

---

[26]Bitterness was felt at this time against the Federal Government over Indian affairs. Indian troubles broke down police control. Robbers were abroad in large numbers; mobs of hopeful land grabbers, vagabonds and ungovernable frontiersmen were vital dangers to the young State. Coulter, *History of Georgia*, 170-1, 284-5. And see footnotes 23 and 24 on the fear and danger of free Negroes. Florida was the settlement contiguous to Georgia and was governed by Spain until 1819.

[27]*Journal of House of Representatives of Georgia*, page 5, Regular Sessions, Nov. 1, 1804, Governor's message.

[28]*Journal of House of Representatives of Georgia*, page 48, Dec. 10, 1804.

[29]*Journal of House of Representatives of Georgia*, Extra Session, May 15, 1804, page 19. Charges exhibited against Jabez Bowen, Junior Judge of Superior Courts of Eastern District. He burned a court record; charged a grand jury urging principles (not stated) dangerous to lives and property tending to excite insurrection and involve the country in the horrors of domestic warfare; excited Negro insurrection; committed a grand jury to jail for censuring his charge; pointed a pistol at persons in the courtroom while on the bench. The insurrection statute was considered by the House on May 14 (p. 14), May 15 (pp. 18 and 19), May 17 (p. 22) and May 19. See further, *Senate Journal*, Extra Session, May 17 (p. 7), May 18, May 19 (p. 9), when the Act was passed and delivered to the Governor.

The insurrection section appears in the Penal Code of 1817 in a slightly modified form. The offense was no longer denominated as a felony but as a crime against the State and the People.[30] The unsettled character of contiguous territory and the frequent outbreaks of Indian warfare apparently continued at the time of its reenactment.

Repetition of the statute in the same form occurs in the revision of the Penal Code of 1833. At this time, "abolitionism," "nullificationism" and Indian troubles[31] seem to have created conditions of sufficient stress to warrant continuance of the provision in the Code revision without debate.

In the Georgia Code of 1861 the provisions again appeared.[32]

---

[30] *O. H. Prince's Digest of Laws of Georgia*, 1822, page 346.

[31] Coulter, *op. cit.*, page 286; R. P. Brooks, *History of Georgia*. Georgia offered $5,000 reward for Garrison, denominated by Governor Schley as a fanatical insurrectionist masquerading under philanthropy. Nat Turner's bloody insurrection had just taken place in Virginia. Georgia, furthermore, contemplated nullification of, and refused to pay, the Federal tariff of 1832. In 1825 there had been virtual civil war over Indian lands. Indian troubles came to a head in the removal of the Cherokees from Georgia. However, the Senate and Assembly Journals of Georgia, between 1832 and 1834, contain no discussion of the insurrection statute and, so, it is impossible to assert positively that existing conditions were believed to require reenactment. The provision may have been carried forward automatically without specific consideration.

[32] In Section 4214. Sections 4704-4706 show the emphasis with which the provisions were made applicable to Negroes:

> "Section 4704. The following offenses, when committed by a slave or free person of color, shall be punished, on conviction, with death, viz.: Insurrection, or an attempt to excite it; * * *.
>
> "Section 4705. Insurrection shall consist in any combined resistance to the lawful authority of the master or the State, with intent to the permanent denial thereof, when the same is manifested or intended to be manifested by acts of violence—the mere resistance of the slave, or his attempt to escape, or actual escape, from the master, shall not constitute insurrection.
>
> "Section 4706. Any attempt, by threats, persuasion, or otherwise, to induce other slaves to join in an insurrection in existence or contemplated, shall constitute an attempt to excite an insurrection."

When substantially the present statute was passed in December, 1866,[33] it was no longer in terms restricted in application to those who incited slaves or Negroes to revolt. Slavery no longer existed and reasons of policy suggested that it would be unwise to have an apparent discrimination in the statute. But consideration of the setting in which it was passed shows, we believe, that it was aimed primarily at conduct analogous to that which had been the target of its predecessors and at other prospective dangers of a temporary character, all of which were the products of post-war conditions and the troubled period of adjustment between emancipation and the tranquil acceptance of new relationships which shortly ensued.

After the close of the War between the States, almost anarchical conditions prevailed in the South[34] and military governors were placed in charge of many of the States. In Georgia, a provisional governor was appointed by the President and plans were made for the restoration of Georgia to its status in the Union. But, first, it was necessary for the State to conform to the conditions laid down by the President. The ordinance of secession was to be revoked[35] and the Thirteenth Amendment approved[36]. To this end the Provisional Governor called a State Conven-

---

[33]*Public Laws of Georgia, Penal Code*, 1866, page 152, approved December 15, 1866. The only difference between the statute as passed in 1866 and the present is that as a result of the decision in *Gibson* v. *State*, 38 Ga. 571, the penalty provision was changed (Georgia Laws, 1871, pp. 19-20) to embrace attempts to incite insurrection which that case held were not included. The definition of the offense was not changed.

[34]See footnotes 43-52, *infra*, and supported text.

[35]Which was done in the Constitutional Convention of 1865. See *Journal*, page 44.

[36]Slavery was abolished in Convention. See *Journal*, page 125. The Thirteenth Amendment was approved by the Legislature, December 5 and 6, 1865.

tion[37] composed of men who, although native Georgians, had not been active secessionists[38]. The Convention gave way in December, 1865, to a State Legislature composed of conciliatory Southerners.

Among the matters considered by the Convention, and later by the Legislature, was statutory provision for the transition of the Negro from slavery to citizenship. Rights were to be given to the Negro, while white men's lives and property were to be protected.[39]

The desire of Georgia not to arouse opposition to its admission to the Union by enacting a Black Code distasteful to the North, and the desire to be rid of the courts of the Freedmen's Bureau,[40] probably prompted the introduction of a Freedmen's Code in Georgia in which, in blanket fashion, practically every reference to, and legal discrimination against, Negroes was removed from all then existing statutes, which statutes, however, were retained for all other purposes.[41] The Negro was not to be subjected to

---

[37] *Documentary History of Reconstruction* (Fleming), I, 195, 163-4; Percy Flippin, *H. V. Johnson*, 270-1.

[38] Neither strong secessionists nor active unionists attended the Convention. Clara Thompson, *History of Reconstruction in Georgia*, pages 148-9.

[39] *Doc. Hist. Reconstr.*, I, 243.

[40] The Bureau courts were acting so illegally they had to be abolished. *Rept. of Gen. Tillson*, Senate Ex. Doc. #2, 39th Cong., 2d Sess., page 54.

[41] Because of hostile criticism of Black Codes of other States, Georgia did not make a separate code. *Savannah Herald*, February 13, 1866; *Macon Journal and Messenger*, February 23, 1866. The Code was passed probably to get rid of Bureau courts, erected by Federal authorities to insure protection of Negroes' civil rights just as the Bureau itself protected laborers from unconscionable contracts. Equal legal rights to Negroes in the civil courts would render the Freedmen's courts unnecessary. Clara Thompson, *History of Reconstruction in Georgia*, page 157. See further on Georgia's desire to conform with Northern demands, Coulter, *Short History of Georgia*, 342-3. However, the Code did not give the Negro equal political rights, such as voting and jury duty.

any other or different punishment from such as were prescribed for white persons committing like offenses.[42]

The Freedmen's Code gradually filtered into the law of Georgia in the Special Session of the Legislature, December, 1865, to March, 1866, and in amendments made in the regular session held during November and December, 1866.[43]

---

[42]Coulter, *op. cit.*, 342; Thompson, *op. cit.*, 157.

[43]The Constitutional Convention in November, 1865, resolved that a Committee of five be appointed to prepare a system of laws applicable to the changed conditions of the Negroes in Georgia (*Journal of the Constitutional Convention*, 1865, p. 174; *Confederate Records of Georgia*, ed. by Candler, IV, 414-5). The Provisional Governor, by request of the Convention, appointed the Committee (*Savannah Nat'l Republican*, Nov. 23, 1865). On December 19 this Committee reported to the Governor a series of eleven laws for the regulation of Freedmen's rights (*Report of Commrs. on Freedmen's Code to Gov. Jenkins*, December 19, 1865, a pamphlet; *Macon Telegraph*, January 9, 1866; incomplete copy in *Savannah Nat'l Repub.*, January 16, 1866). The preliminary report of the Commissioners was made to the Legislature on December 6 and was referred to the Judiciary Committee of each House (*Journal of House of Representatives of Ga.*, 1865/6, pp. 21-3, and *Journal of Ga. Senate*, of same date; *N. Y. Tribune*, December 7, 1865). On December 14 Gov. Jenkins referred to the Negroes' sudden transition from slavery to freedom as the "sudden upheaving of an earthquake", and recommended that the Legislature consider the Freedmen's Code (*House Journal*, December 14, 1865).

On January 15, 1866, Gov. Jenkins transmitted a copy of the Report to the Legislature and recommended that it be adopted in toto as law (*Ga. House Journal*, 1865/6, January 15). The Governor said that the code "is just and liberal to the freedmen. * * * It is as safe as it should be to the citizen" (*Savannah Nat'l Repub.*, Supplement, January 22, 1866). On January 17, the Senate and the House agreed to a joint judiciary committee to consider the report (*Ga. House Journal*, 1865/6, January 17).

The Report referred to is prefaced by the following statement by the Commissioners:

(*Footnote continued on next page.*)

The absence of records of debates on the Freedmen's Code or on the insurrection statute, leaves the precise reasons for the change to the statute in its present form in some doubt. It may have been a mere automatic renewal of the older insurrection law with references to slaves eliminated. It seems likely that policy (and the abolition of slavery) to some extent dictated the omission

---

(*Footnote continued from previous page.*)

"We are sensible that in presenting this system of laws, we may be subjected to the imputation of having done at once too little and too much; too little for those who are expecting *an instant and speedy remedy for all the ills which the present crisis has brought upon us; too much for those whose prejudices have not yet yielded to the necessities of our situation.*

"*The mischiefs to be remedied are enormous,* and there is more or less of an indefinite hope and expectation, that legislation will afford at once and with all certainty, the proper remedy. It is impossible that this hope can be gratified, this expectation realized. The results which are to ensue from such legislation, presents a problem that can only be wrought out by experience. A prominent factor in the solution must therefore be time. We cannot expect that for this our distressed people will patiently wait, and more or less of disappointment must ensue. Prepared to accept this result, we shall not be mortified by intimations of feebleness, or imputations of failure, and shall be satisfied with the humble need of having honestly endeavored to do our part, and thereby contribute aid to those who are charged with the difficult duty of *guarding the State and the persons of color in our midst from the evils of sudden emancipation.*" (Italics ours.)

The Report proposed a system of laws in eleven articles. Article I provided in part:

"§1. A Convention of this State having recognized the emancipation of slaves, and having declared that neither slavery, nor involuntary servitude, except as a punishment for crime, shall ever be established in this State, all statutes, regulations, and municipal enactments concerning slaves, are therefore now inapplicable to the circumstances and conditions of our people.

(*Footnote continued on next page.*)

of the limitation upon its application to uprisings of Negroes or slaves. The conditions at the time of its passage combined the supposed dangers of uprising by former slaves with the new danger incident to the removal of some of the restrictions upon them. The period was an interlude between the end of a familiar and the creation of a new relationship between different parts of the popula-

---

(*Footnote continued from previous page.*)

§2. The statutes, regulations, and municipal ordinances concerning free persons of color in our State, having been passed with more or less of relation to the existence of slavery among persons of color in this State, are also, for reasons stated in the above section, now inapplicable to our circumstances and condition, and are repealed, except as to offences committed before the passage of this act. * * *"

The Report continues with articles applying to county courts, the relations of husband and wife, parent and child, guardian and ward, master and servant, master and apprentice, the law of contracts, decedents' estates, the criminal law and licenses.

Article XI, entitled "Offences Relative to Persons of Color and Other Offences by White Persons", provided:

"§1. The Thirteenth Division, Part 4, Title 1, of the Code of Georgia, concerning offences relative to slaves, being from Section 4487 to Section 4515, inclusive, is hereby repealed."

Section 3 provided:

"In all offences which require the concurrent action of two or more, committed by white persons and persons of color jointly, the offenders may be separately tried and punished according to the provisions of law for each class of such offenders."

Article XII, entitled "Offences by Persons of Color", provided in part:

"§1. The definitions of and circumstances constituting offences, including those in the foregoing article, the persons capable of committing them, and the defences allowed thereto, as also the rules of evidence and practice on the trial of of-

(*Footnote continued on next page.*)

tion; other sources of danger were inherent in post-war conditions; but all these troubles ended when harmony was established anew at the conclusion of the tragic era of Reconstruction.

The conditions in Georgia and other Southern States, at the time of the passage of the statute in 1866, seemed, to many, pregnant with danger, due to the release of

---

(*Footnote continued from previous page.*)

fenders, wherever applicable, unless expressly excepted, shall be the same for persons of color, as for whites."

Speaking generally, the Report sought to assimilate the rights of Negroes to existing rights of white persons, but certain distinctions were continued. The Report contains no general code of criminal laws and no discussion or recommendation with respect to the insurrection statutes. However, Article XII, §6, provided:

> "Any person of color who shall join or unite with any band, society, or association, formed without authority of law for the purpose of injuring white persons in person or property, shall on conviction be punished as provided in §4 of this Article, and shall be moreover liable to punishment for any overt act in violation of law, * * *."

Article XI contained a somewhat similar provision apparently aimed at white persons:

> "§13. Any person who shall be a member or associate of any band, association or combination, formed without authority of law, for the purpose of injuring persons of color, in their persons or property, whether under pretence of punishing crime, or otherwise, shall be guilty of a misdemeanor, and punished, on conviction, by fine or imprisonment in the common Jail or both, at the discretion of the Court; and shall moreover be liable to conviction and punishment for any overt act, according to law."

The Report contains no discussion of the provisions just mentioned, and it seems probable that they were directed, particularly, at organizations of the kind which flourished immediately after the War. (The only known copy of the Report is in the De Renne Georgia Library, Savannah, Georgia. A photostatic copy will be handed up to the Court upon the argument.)

animosities and removal of the physical restrictions of slavery. From April, 1865, until the close of the Reconstruction period, Georgians continually expressed fears of slave insurrection, especially at Christmas time, 1865.[44]

Other temporary sources of danger to a community recently returned to the ways of peace after the disruption of a long war, intimately affecting its territory, existed. The Legislature naturally wished to assure the Federal authorities that all of the momentary threats to law and order could and would be controlled. Among the sources of possible trouble were the die-hard secessionists, incipient Ku Kluxers, "jayhawkers", "regulators", "black-horse cavalry,"[45] poor whites,[46] "union leaguers", Freedmen's

---

[44]While Carl Schurz, Grierson and other Northerners scouted the basis for Southern fears of Negro insurrection (*N. Y. Daily Tribune*, October 28 and December 2, 1865, and March 7, 1866), the following references show vivid fear of Negro insurrection in the South: *Rept. of Joint Committee on Reconstruction*, 39th Cong., 1st Sess., pt. iii; House Misc. Doc., 41st Cong., 2d Sess., page 482; Senate Ex. Doc. #43, 39th Cong., 1st Sess., page 4; Senate Ex. Doc. #2 (Same Congress), page 5; II, *Doc. Hist. of Reconstr.*, 344; *Savannah Nat'l Repub.*, September 21 and November 16, 1865; *Civil War and Reconstr. in Ala.*, 1865-6 (Fleming), page 383 (reports fear of Negro insurrection in Alabama); *Appleton's Annual Cyclopedia*, 1865, page 627 (recites fear of insurrection in North Carolina); Stephenson and Fleming, *Confederacy and Reconstruction*, page 48; J. C. Harris, *History of Georgia to Recent Times* (1896).

[45]"Bands of men styling themselves 'Regulators', 'Jayhawkers' and 'Blackhorse Cavalry' have infested different parts of the State, committing the most fiendish and diabolical outrages upon the freedmen" (*Report of General Tillson*, November 1, 1866, Senate Ex. Doc. #6, 39th Cong., 2d Sess., p. 55; II, *Doc. Hist. of Reconstr.*, 360).

[46]Hostility existed between poor whites and free Negroes (Thompson, *Reconstr. in Ga.*, 129-131; Dennet in *N. Y. Nation*, February 1, 1866; Truman, *N. Y. Times*, November 23, 1865; *Joint Committee on Reconstr.*, 1866, pt. iii, pp. 42, 46, 129).

agents[47] and abolitionist ministers seeking to stir up Negro discontent[48] by extravagant promises of "40 acres and a mule" for every Negro.[49] In addition to these political rivalries giving rise to riotous acts, robbery, stock stealing and crimes of violence were common.[50] So great were the fears of disorders and insurrection that the Georgia

---

[47]Union leaguers controlled Negroes, II, *Doc. Hist. Reconstr.*, 3. R. P. Brooks, *History of Georgia*, describes the Freedmen's Bureau as a centre for office-seekers and idle Negroes, a political machine. See also *Ku Klux Rept.* (1871), *Georgia Testimony of Gen. Wright*, 272, *Ibid., Minority Rept.*, 441; *House Rep. Minority Rept.*, #121, 41st Cong., 2d Sess., pages 47, 53; J. Wall, a Negro, in his *Carpet Bag Rule in Florida*, said that the Bureau, with the best intentions in the world, was the worst curse of the race.

[48]R. P. Brooks, *Hist. of Ga.*, 324-7. Negroes were encouraged by agents of the Freedmen's Bureau and by the "carpet baggers" to believe that the white people's land would be divided among them.

[49]These elements were to resolve themselves after 1866 into the Radical Republicans, "scalawag southerners" and carpet-bag legislators opposed by the conservative Southerners and Ku Klux Klan. The latter organization was founded in Tennessee in May, 1866 (W. G. Brown, *Lower South in American History*, ch. IV). "There were scores . . . of secret protective and revolutionary societies in the South, ranging from the small bodies of neighborhood police, which were common in 1865 and 1866, to the great federated orders like the White Camelia covering the entire South . . ." (II, *Doc. Hist. of Reconstr.*, p. 327).

[50]Conditions were so primitive that horse stealing was made punishable by death (Coulter, *op. cit.*, 330); stealing stock (Avery, *Hist. of Ga.*, p. 353); violence by whites against Negroes (*N. Y. Tribune*, September 4 and 15, 1865, February 6, 1866). Frequent examples of bushwacking, plundering and stealing by Negroes and young whites were recorded in the spring and summer of 1865 (*Official Records of War of Rebellion*, vol. XLIX, pt. ii, pp. 1061-2; vol. XLVII, pt. iii, pp. 595-6, 665-6; *N. Y. Times*, December 11, 1865; *N. Y. Herald*, May 20 and 21, 1865; *Macon Telegraph*, December 1, 30, 1865).

Constitutional Convention, in November, 1865, requested the Provisional Governor to provide a police force in the several counties throughout the State. This was done before December.[51]

The source and root of these conditions lay in the many diverse consequences of the War.[52] The Negroes were demoralized. Hoping for freedom from labor as a concomitant of emancipation, vagrant and vagabond Negroes swarmed towards the cities where death and starvation[53] alone were awaiting them. The demoralization of the Negro led to disruption of the labor system. The latter outcome, combined with the destruction of railways by Sherman, financial distress, Federal taxes, disorganization of agriculture and the growth of city population,—all brought about the destruction of the old social order of planters, lawyers and factors. Destruction of the old social system, decrease in white population and proportionate increase in black population, demanded a new adjustment of relations between the two races.[54] The fear entertained by Southerners that the Negroes would be stirred to insurrection by Christmas, 1865,[55] proved to be un-

---

[51]Avery, *History of Ga.*, page 353; *Confederate Records of Georgia*, IV, 97, 100, 294; *Macon Telegraph*, May 24 and June 1, 1865 (expresses need of military authority against vagrants).

[52]See, generally: E. C. Woolley, *Reconstr. in Ga.*, pages 17-8; Flippin's *H. V. Johnson*, page 264 ff.; Thompson, *Reconstr. in Ga.*, page 43; Brooks, *Hist. of Ga.*, pages 302, 321; *Milledgville Federal Union*, January 9, 1866.

[53]Death rate: over 30,000 Negroes in one year in Augusta; 500 a month in Macon (*Savannah Nat'l Republican*, November 16, 1865; *N. Y. Times*, December 31, 1865; *Joint Committee on Reconstr.*, pt. iii, p. 173; *Confed. & Reconstr.*, Stephenson & Fleming, p. 41).

[54]Coulter, *op. cit.*, 331-5; Brooks, *Hist. of Ga.*; C. Thompson, *Reconstr. in Ga.*, Flippin, *H. V. Johnson.*

[55]See footnote 44 and text, *supra.*

founded,[56] but conditions giving rise to disorder, and the fears thereof,[57] continued until several years after the enactment of the present statute in 1866.

This background and history seem to us to demonstrate that the statute was aimed at quelling possible disorders of the special and unprecedented kind threatened immediately after the Civil War. The dangers then facing the State soon passed with the natural adjustments which followed. Thus, even if the statute could be considered to be of the type considered in the *Gitlow* and *Whitney* cases, this history forbids the conclusion that the Legislature determined, in 1866, that organization of membership in the Communist Party, or activities of an analogous character, were deemed to constitute a substantial evil to which the statute could be applied. Thus, the statute has no preliminary support in a rebuttable presumption arising out of a legislative finding of danger to the State. The disappearance of the particular ephemeral evils at which the statute was aimed effectively rebuts any presumption which might possibly arise from its passage (cf. *Chastleton Corp.*

---

[56]Some outrages occurred in the last week of December, 1865, and early January, 1866, but it was, in fact, an unusually quiet Christmas. *Milledgville Fed. Union*, January 2, 1866; *Savannah Nat'l Repub.*, January 1, 3, 10, 12, 1866; Stephenson and Fleming, *Confed. & Reconstr.*, 48; *Confed. Recs. Ga.*, IV, 44, Governor's message of January 8, 1866.

[57]*The Critical Year*, by H. K. Beale, pages 155-6: "The South swarmed with Radical trouble-makers and nascent carpet-baggers". In March, 1866, Grant had to forbid Negro celebration which threatened disorder in Richmond, Va. There was rioting in New Orleans, also rowdyism in Atlanta, Ga. (Thompson, *Reconstr. in Ga.*, 132). Clara Thompson, *Reconstr. in Ga.*, pages 361-394, discusses the Ku Klux Klan and social disorder which lasted from 1865 until 1871. Also see pages 116-7, 129-131. Note that the spirit of Georgia, itself, on the other hand, was to put down rioting and disorder. *Journal of House*, 1866, page 31, November 1, 1866, Gov. Jenkin's advice to the Legislature. "Our interest lies in eschewing political excitement, studiously avoiding all conflicts with the authorities, unchosen by us, but placed over us. . . ."

v. *Sinclair*, 264 U. S. 543; *Abie State Bank* v. *Bryan*, 282 U. S. 765). So far as we have been able to ascertain, it was not applied, after its passage, until it was used shortly before appellant was indicted (See *Carr* v. *The State*, 176 Ga. 747 [1933]). This long period of disuse is, in itself, evidence of the disappearance of the conditions at which it was directed and the fact that no one regarded it as appropriately molded to fit others. Its continued presence on the statute books can give rise to no presumption in its favor which makes it applicable to an entirely new and unforeseen type of political activity.

Facts of which this Court can take judicial notice show that the sovereignty of Georgia is secure,[38] that organization of membership in the Communist Party has at no time been of such size as to give concern to the Georgia authorities. The present record demonstrates that the doctrine advocated in the Party literature did not give reasonable grounds to fear violent overthrow of the State. In these circumstances, it cannot reasonably be believed that, in Georgia, "the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion." (See concurring opinion of Mr. Justice Brandeis in *Whitney* v. *California, supra*, p. 377.)

The statute as construed by the court below cannot be regarded as a reasonable exercise of the State's police power to protect it against violent assault, and a statute so construed must be regarded as an arbitrary interference with the right of appellant to express his views and to organize those persuaded to similar views for political action.

---

[38]Appellant referred to the fact that there were only five or six actual members of the Communist Party in Atlanta (R., 62). In 1932 the Communist candidate for President of the United States polled 23 votes in the whole State of Georgia, and in 1928 the Communist candidate polled a total of 64 votes in the entire State. In 1924 no votes were cast for the Communist candidate. In 1920 there was no Communist candidate. Georgia's steady adherence to the tenets of one of the major American political parties, demonstrates its tenacity of political opinion.

POINT II.

The challenged statute is also invalid because it contains no sufficiently definite and certain standards of guilt.

After holding that the statute under attack does not require that forcible resistance to the authority of the State should follow immediately or at any given time, the court below in its opinion upon petition for rehearing interpreted the statute to apply:

> "* * * if he intended that it [an insurrection] should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce" (R., 196).

We contend that the statute, thus construed, embodies a standard of liability so indefinite that it contravenes the due process clause of the Fourteenth Amendment.

A jury would be authorized to convict if it found that the defendant intended that forcible resistance to the State's authority should occur at some time (however remote), and if the jury felt that the defendant should reasonably have believed that his influence would at that time be directly operative in causing the forcible resistance. Proof that an alleged offender did, in fact, believe that his efforts would cause forcible resistance to the State's authority, would not be required; it would be enough if the jury could be persuaded that the defendant favored forcible resistance at some time and that he might reasonably have believed that his activities would have some influence in bringing it about.

The question whether a defendant might reasonably believe that his words would have some effect in causing an insurrection at some indefinite future time, is imponderable and unreal, as the present case shows. Assuming,

for the present purpose that the appellant intended that, if necessary, forcible resistance to the authority of the State should be used at some undetermined time to put into effect the program of the Communist Party in Georgia, what factors could be considered in estimating whether that indeterminate time would be within what appellant might reasonably believe to be the trajectory of his influence? The decision of a national or international political party whether and when to resort to violence, would presumably be dependent upon its leaders throughout the years to come; the resolution of its leaders would, in turn, be dependent, it may be assumed, upon the success of the Party organization in Georgia and elsewhere,[59] and the success of Party organization would be dependent upon changes in community opinion throughout the country that

---

[59]The program of the Communist Party set forth in some of the documentary evidence is a program for what it calls the "Black Belt". Reference to "The Communist Position on the Negro Question", No. 13 (R., 102-111), shows that the "Black Belt" includes parts of all of the Southern States. Thus action in any particular State would obviously depend upon the success of Party organization in all of the other States composing the "Black Belt". In order to prophesy how soon that organization would reach a point where the leaders of the Party would be likely to attempt to put the program into effect, it would be necessary not only for the jurors to imagine the community with which they were familiar in a different condition, but also to imagine fundamental changes in other communities, with the present conditions in which it is unlikely that they were familiar. Even in their own community, it would be necessary for them to speculate upon the length of time required to increase Party membership from the five or six members which appellant stated there were in Atlanta, and the apparently small number of Party members in the entire State (see footnote 58, *supra*) to a number which the leaders of the Party would deem sufficient for effective action. Whether the Party leadership would wait until there were five hundred, a thousand, ten thousand or a hundred thousand members in Georgia (and a like number in other nearby States) would have to be determined, and there is no possible basis upon which it could be.

would be inconceivable without a complete transformation of the patterns of our national life. The question, in short, calls for speculation upon the effect of unknown forces in a hypothetical community of the future; it cannot be answered by knowledge derived either from common experience or special study; it cannot be answered by any wisdom of the politically sagacious. If a jury is nevertheless permitted to answer it, bias and prejudice are the only standards it can employ.

A statute which requires for its application the answer to so imperfect a question contains a standard of liability which necessarily renders it invalid under the due process clause of the Fourteenth Amendment. In *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, a case involving prosecution under an Act of Congress, this Court reaffirmed the rule that penal statutes cannot be sustained when they fail to afford a definite standard for the guidance of the court and jury in ascertaining guilt or innocence. In declaring the statute unconstitutional this Court, in words applicable to the statute under consideration, said (pp. 89-91):

> "Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. * * *

> That it results from the consideration which we have stated that the section before us was void for repugnancy to the Constitution is not open to question."

In *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, this Court held invalid a Kentucky statute aimed at monopolistic price-fixing which made criminal the controlling of the price of goods so as to sell them above their real value, which was construed to mean market value under fair competition and under normal market conditions. The Court recognized that this statute required the jury to fix real value by reference to an imaginary world in which monopoly was eliminated and fair competition was assumed to exist. In holding the statute unconstitutional this Court said (p. 223):

> "The reason is not the general uncertainties of a jury trial but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts. It is easy to put simple cases; but the one before us is at least as complex as we have supposed, and the law must be judged by it. In our opinion it cannot stand."

The difficulties of imagining a tobacco market in Kentucky under free competition seem to us less great than the difficulties of imagining the changes in the community life of Georgia and its neighboring States and the decisions which would be made by leaders of the Communist Party, preliminary to a prediction of what effect appellant might reasonably have expected his influence to have as future events unfolded. Due process denies clairvoyance so large a part.

Many other cases establish that statutes which, in effect, leave to courts or juries the power to declare an act a crime without containing, in themselves, any reasonable test for discovering whether the particular act was intended to be proscribed, are void. See *Connally* v. *General Construction Co.*, 269 U. S. 385; *Louisville & Nashville. R. R.* v. *Railroad Commission of Tennessee*, 19 Fed. 679 (C. C., M. D., Tenn.); *Tozer* v. *United States*, 52 Fed. 917 (C. C., E. D., Mo.); *State* v. *Parker*, 183 Minn. 588; *Louisville & N. R. Co.* v. *Commonwealth*, 99 Ky. 132; *Ex parte Jackson*, 45 Ark. 158; *Czarra* v. *Board of Medical Supervisors*, 25 App. D. C. 443; Aigler, *Legislation in Vague or General Terms*, 21 Mich. L. Rev. 831, 843, 848, containing a list of State cases declaring State statutes void for uncertainty; cf. *Standard Chemicals & Metals Corp.* v. *Waugh Chemical Corp.*, 231 N. Y. 51.

In the last cited case, which involved the Lever Act, Mr. Justice Cardozo, writing for the New York Court of Appeals, said at pages 54-55:

> "The act, as the Supreme Court construes it, rejects all objective standards, all determinate or determinable criteria, the tests of practice or precedent or the market or the vicinage. Rejecting these, it sets the individual adrift upon the uncharted sea of subjective prejudice and favor. The *arbitrium boni viri*, unrestrained and undirected, becomes the test of right and wrong."

The risks incurred in violating the Lever Act were far less hazardous than those to which the appellant was subjected by the statute challenged here. The due process clause requires that criminal statutes shall be so framed that those to whom they are addressed may know what standard of conduct is intended to be required, so that men may guide their steps accordingly. See *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *United States* v. *Capital Traction*

Co., 34 App. D. C. 592; *Tozer* v. *United States*, 52 Fed. 917, *supra*; *Indefinite Criteria of Definiteness in Statutes*, 45 Harv. L. Rev. 160.

In *Connally* v. *General Construction Co.*, 269 U. S. 385, *supra*, this Court, through Mr. Justice Sutherland, said (p. 391):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The statute under which appellant was convicted created a crime unknown to the common law. Apparently, it had been applied only once since its enactment in 1866. The circumstances of appellant's arrest, his incarceration and the indication that he would be discharged if not indicted, suggest that even the prosecuting authorities did not feel that the statute clearly applied to his conduct. Its meaning was so doubtful that it has been construed in three different ways in the instant case—upon the trial, in the original opinion of the court below and in its opinion upon rehearing. Thus, the courts charged with the duty of applying the law have themselves not been free from confusion in determining its meaning. The appellant, with no prior judicial declarations to guide him; with no well-settled common law meaning to inform him (cf. *Nash* v. *United States*, 229 U. S. 373); with no well-known technical or special meanings to attach to the words, to enable him to determine how the statute would be applied; with

no standard, explicit or implicit, to assist him in planning his conduct, was compelled by the vagueness of the language used to put his life in jeopardy to discover whether or not his actions constituted the crime denounced. Surrender of his right to express his views was the price of safety. None could determine in advance whether such surrender in the circumstances of the present case was the mandate of the statute.

If the validity of the statute should be sustained by this Court, it is plain that no man in Georgia can safely seek to persuade others that a fundamental change in the structure of government should be brought about at a future time by the use of force if ultimately necessary, unless he is willing to gamble his life that the jury will guess that the undetermined time when he contemplates that force may be necessary is not included within the period in which he "might reasonably expect his influence to continue to be directly operative". In a case where there is grave danger that freedom of expression will be suppressed by the threat of a statute so elastic in circumference, the language in *McBoyle* v. *United States*, 283 U. S. 25, 27, is peculiarly applicable:

> "• • • It is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."

A statute restricting freedom of speech in accordance with the test laid down in the *Schenck* case, *supra*, would be free from the infirmity of the present statute. The proof required to establish that utterances gave rise to a clear and present danger to the authority of the State could be appraised by a jury in the light of their experience and observable phenomena (cf. concurring opinion of Mr. Justice Brandeis in *Whitney* v. *Cali-*

fornia, supra, at pp. 376, 377, 379). There would be apparent movements and stirrings which are the inevitable preliminaries of violent insurrections, or the words used would be such that the jurymen could say that they were calculated to and did appeal to their hearers as exhortations to immediate forcible action. They would be weighing the effect of speech upon the world around them and not the effect of its echoes upon some future community, changed perhaps in some important but unknown respects.

POINT III.

There was no evidence that appellant advocated the use of violence or other unlawful means; accordingly the statute as applied to him is invalid under the due process clause of the Fourteenth Amendment.

Unless the appellant urged that force be employed to achieve the reforms which he advocated, the statute is invalid as applied to him, regardless of the disposition of his challenge to the statute as interpreted by the court below. *Fiske* v. *Kansas,* 274 U. S. 380. It is necessary therefore to re-examine the evidence on which the conviction was sustained.

The testimony of the State's witnesses (*supra,* pp. 4-5) may be summarized as follows: Appellant had come to Atlanta from another State as an organizer for the Communist Party; his duties, as organizer, included the calling of meetings, dissemination of information at meetings, distribution of literature and other usual activities embraced in working up a Party organization in Georgia; certain literature was found in a box carried by appellant at the time of his arrest, and other literature was found in his room; some of this literature came to appellant from Communist Party Headquarters, and some had not even been unwrapped (R., 67); he was the author of one of the

circulars issued under the name "The Unemployed Committee of Atlanta" (R., 62-3), which the court below said "may not have been of any considerable importance within themselves" (R., 166). Appellant stated to one of the witnesses that there were only five or six actual members of the Party in Atlanta; he had held or attended only two or three meetings in connection with his work as Party organizer (R., 166-7). Distribution by appellant of only two classes of circulars was proved directly, and these were characterized by the court below as "of a more or less harmless character" (R., 166). No one testified to having heard appellant make any speeches, distribute any other literature, resist arrest, or combine with others to resist the authority of the State; there was no testimony that appellant had ever advocated acts of violence or forcible or any other kind of resistance to the authority of the State. There was no evidence as to the nature of appellant's conduct at the meetings which he had held or attended, as to discussions at such meetings, or appellant's part, if any, in such discussions. There was no evidence that appellant had procured the five or six members of the Party in Atlanta. At least one was a member long before appellant went there. (R., 99).

The testimony of the witnesses, therefore, as we have said above (p. 7) showed nothing beyond the fact that appellant was an organizer for the Communist Party in Atlanta, and that when arrested he had, among other things, some of its literature in his possession.

In its original opinion, the court below referred to appellant's statement to the jury as an indication that he believed that a crisis was impending (R., 176). Careful examination of his entire statement (R., 70-8) reveals no advocacy of violence or forcible resistance to the State's authority. The statement that appellant thought that our present system was on the verge of collapse, is without significance. There is not the slightest evidence that he, or anyone else under his influence, proposed to treat the

collapse which he thought impending as an opportunity to overthrow or resist forcibly the authority of the State. So far as the statement threw any light on appellant's state of mind, it seems to us more consistent to assume that he thought existing conditions favorable to the increase in membership of the Communist Party, and that, through increase in its political power, the Party program could be achieved peaceably. The pessimistic view of existing conditions stated by appellant, has been too frequently repeated by respected and peaceful citizens in this country and elsewhere, to carry any implication that expression of the view must accompany an intent to participate in or urge others to overthrow democratic institutions by force. Appellant's statement to the jury contained nothing to support the judgment of conviction although quite conceivably it may have inflamed the local prejudice of the jurors by reference to irrelevant matters such as the treatment of the unemployed and conditions in the local jail.

The extensive quotation by the court below from the literature found in appellant's possession, indicates that this evidence was regarded by that court as furnishing practically the only support for the judgment of conviction. We believe that, when calmly analyzed, the documentary evidence, or his possession of it, furnishes no basis whatever for the conclusion that appellant was advocating or inducing others to join in forcible resistance to the authority of the State. In substance, the literature went no further than the preamble to the constitution of the Industrial Workers of the World, considered by this Court in *Fiske* v. *Kansas*, 274 U. S. 380, *supra*, and that decision compels the conclusion that the application of the present statute to appellant was invalid.

Before analyzing the documentary evidence in detail, it is appropriate to consider certain preliminary matters. In the first place, there was no proof that appellant had distributed any of the literature which the court below

regarded as especially significant. His mere possession of it did not warrant the inference that appellant was personally advocating everything contained in the documentary evidence. The fact that only single copies of some of the documentary evidence appear to have been found in appellant's possession or in his room, negatives an inference that he was distributing them.[60] We believe, however, that even if the jury was entitled to infer that appellant intended to distribute such of the literature as was found in his possession in quantity, application of the statute to him was still invalid.

In appraising the documentary evidence it is, of course, necessary to read the documents as a whole and not to wrench words or phrases from their context and thus achieve a false emphasis unjustified by their setting. This principle, to be applied in considering this documentary matter, is the familiar one applied in criminal and civil libel actions, in slander actions and prosecutions for obscenity, which requires writings and utterances to be construed as a whole. See *United States* v. *One Book Entitled Ulysses*, 72 Fed. (2d) 705 (C. C. A. 2nd); *United States* v. *Dennett*,

---

[60]Due to an apparent error in preparing the bill of exceptions, it is now difficult to distinguish (except by the description of their physical characteristics) between documents which were found in the box under appellant's arm at the time of his arrest and those which were later unlawfully seized in his room. The testimony distinguishes between them without identifying all of the documents specifically. The introduction to the brief of documentary evidence and the motion for new trial do not distinguish between them, although it is apparent from a comparison of the testimony with the brief of documentary evidence and the motion for new trial, that it was physically impossible for all of the documents to have been contained in a small box under appellant's arm at the time of his arrest. Obviously, an inference cannot reasonably be drawn that appellant distributed all the documents found in his room, particularly those of which only one copy was found; yet the inference that appellant had distributed this literature was the main support adduced by the court below for its conclusion that appellant had attempted to induce others to combine for insurrectionary purposes.

39 F. (2d) 564 (C. C. A. 2nd); *Dupont Engineering Co.* v. *Nashville Banner Publishing Co.*, 13 F. (2d) 186, 189 (D. C., M. D., Tenn.); *Commercial Pub. Co.* v. *Smith*, 149 Fed. 704, 706 (C. C. A. 6th); *Halsey* v. *New York Society*, 234 N. Y. 1, 4; *Klaw* v. *New York Press Co., Ltd.*, 137 App. Div. 686, 688; *Daniel* v. *Moncure*, 58 Mont. 193, 200; *Flaks* v. *Clark*, 143 Md. 377, 382; *Stevens* v. *Storke*, 191 Cal. 329, 334; *Moore* v. *Booth*, 216 Mich. 653, 656; see also the dissenting opinion in *Schaefer* v. *United States*, 251 U. S. 466, 483. Furthermore, proper judgment upon the true meaning of the documents requires recognition of their generic relationship to American political tracts, which traditionally contain rhetoric and eloquence which the average reader naturally appraises somewhat skeptically.

The "Extracts from the Statutes of the Communist Party of the U. S. A." contained in the membership books found in appellant's possession (R., 94-7), outline the form of the Party organization and contain references to the importance of Party regularity and discipline. They contain no advocacy of insurrection but only quite harmless description of the Party's structure. They also contain some slight exposition of the nature and ideals of the Party. In the course of this explanation, the word "revolutionary" appears. It is also used in several of the other documents which we shall discuss, and the court below seemed to attach especial significance to it (R., 177). When it is considered in its setting it is perfectly plain that the word does not imply any advocacy of force or intent to overthrow the government forcibly. It is often used in describing the Marxist theory to distinguish the principles of Marxism from more conventional economic doctrine. The word occasionally appears as a part of the phrase "proletarian revolution". This implies a change in what the Party asserts, elsewhere in the documentary evidence, to be the present distribution of political power. There is nothing to indicate that the change could not occur peacefully. Economists and historians have long described the

changes in the economic system of the world effected through scientific development and the general substitution of machines for handicraft as the "industrial revolution". The changes since March 4, 1933, have sometimes been described as the "Roosevelt Revolution" (see Lindley, *"The Roosevelt Revolution"*). Such phrases carry no implication that changes were brought about through violence. Thus, the words "revolutionary" and "revolution" in the documentary evidence in this case, are to be considered as describing a new political or economic program, without any implication that its achievement will involve force. Such words are merely symbols of important change, and, in view of the political traditions of this country, imply, at most, a substantial shifting of economic and political power as a result of lawful activity.

The original opinion of the court below quotes from a booklet entitled "The Communist Position on the Negro Question" (R., 102-11). This booklet contains excerpts from a speech delivered in 1932 in nominating a candidate for Vice-President of the United States at a lawfully held convention of the Communist Party (R., 103-4). These excerpts must, of course, be read in the light of the traditional purpose and nature of nominating speeches at national conventions. The speaker for the Party (who was not appellant) demanded confiscation of lands now owned by white landowners in the so-called "Black Belt". This and the following statements of party principle are couched in the familiar language of party platforms. The statement of a "demand" at a party convention is not a call to party members to take individual or collective illegal action. It is an appeal to voters for support. Certainly "confiscation" might occur through constitutional means and the use of the word does not imply the employment of violence. If words are to be used loosely, the Eighteenth Amendment or the recent legislation affecting the gold content of the dollar might be regarded as resulting in widespread confiscation, but that

was accomplished without violence. The speaker further said that the Party proposed to change State boundaries and establish State unity for the "Black Belt". There is no suggestion that this was to be done through violence. It is clear that it could be done by constitutional amendment or possibly by compact among the States affected. A further "demand" is that the Negroes are to be given the right of self-determination in the territory, the right to set up their own government, and the right to separate, if they wish, from the United States. In view of the nature and setting of this "demand", it cannot be regarded as importing or advocating the use of violence. The phrase "right of self-determination" came into general currency through its use by President Wilson, and its use connotes orderly and peaceful decision in the territories affected through plebiscites or otherwise. Peaceful exercise of that right would result in setting up a government acceptable to those exercising the right of self-determination. It is possible that even secession might be accomplished peacefully. Certainly, that eventuality must be regarded as so remote that even if it should be deemed to import the use of force, it cannot be taken seriously as a threat to the authority of the State of Georgia. Considered in their setting, it is quite clear that the remarks quoted in the statement did not constitute advocacy of the use of violence against lawful authority. In any event, there is no proof that appellant shared the views expressed or in any way made them his own. Even if it should be assumed (although the record contains no proof of the fact) that appellant had distributed some of these circulars, it is perfectly clear that the purpose of the distribution was to increase membership in the Communist Party and not to induce direct action.

The court below also referred to another part of the same pamphlet containing "Resolutions of the Communist International on the Negro Question in the United States" (R. 104). This resolution contains the same general pro-

gram set forth in the nominating speech referred to above. It purported to show that the international organization of the Communist Party took the same view of the Party program for the South that had been expressed at the Party convention. No significance is to be attached to the word "revolutionary" in this statement for reasons given above. The resolution contains the following statement: "Within the limits of this State [meaning a State comprising the Black Belt] there will of course remain a fairly significant white minority which must submit to the right of self-determination of the Negro majority. There is no other possible way of carrying out in a democratic manner the right of self-determination of the Negroes". There is no justification for an inference that the suggested dominance of the Negro majority over the white minority should be achieved through violence. The reference in the booklet to the fact that the change in the relation between Negroes and whites suggested, was the only possible way of carrying out the right of self-determination in a "democratic manner" shows that the emphasis is upon maintenance of democratic institutions and not upon their destruction.

The suggestion that Party members should "demand" that "no armed forces of American imperialism should remain on the territory of the Black Belt" is again a mere statement of a Party purpose consistent with the idea that its program could be carried into effect through lawful means. The resolution further states: "Even if the situation does not yet warrant the raising of the question of uprising, one should not limit oneself at present to propaganda for the 'right to self-determination', but should organize mass actions, such as demonstrations, strikes, tax boycott movements, etc." We believe that this is the only statement in all of the documentary evidence from which any possible inference could be drawn that the Party program might eventually contemplate some use of force to carry it into effect. But this statement declares explicitly, not

only that any actual violence is deferred, but that even the consideration of the question whether violence would ever be necessary, is premature. Where such doubts exist, and the way to peaceful action is clearly left open, it is not to be assumed that the doubts would be resolved in favor of the use of violence, and advocacy of that use by appellant, in defiance of the expressed wish of the leaders of the Party to whose discipline he was subject, cannot be inferred. The suggestion for mass action does not involve any forcible resistance to the authority of the State. All of the action mentioned could be carried out peacefully, and, considering the number of actual members in the State indicated by the election returns (*supra*, footnote 58), even the mass action suggested would necessarily be long deferred. The resolution recognizes that "it is just possible for the Negro population of the Black Belt to win the right to 'self-determination during capitalism". This is a clear recognition that the demands of the Party may be achieved without any resort to force, and it negatives any possible inference that force is implied in the Party program. The conjunction of this statement with reference to "national rebellion" shows that the word "rebellion" is used in the same sense as the word "revolution" which we have discussed above, and that it does not imply the use of violence. Reference to the Party's "Bolshevik line on the Negro question" is obviously a mere characterization of the program previously stated, and adds nothing to the implications of that program.

The court below seems to have felt that because some of the changes advocated might give rise to violent opposition the appellant must have intended, in advocating the changes, to advocate violence in their support (R., 177). Even were such an inference justifiable, which it is not, it seems clear that appellant would then only have been advocating lawful self-defense, which is permissible. If the court intended to go further and infer advocacy of violence from the anticipated difficulty of obtaining the objectives

of the Communist Party in the South by peaceful means, the inference is obviously improper. Men cannot be deemed to advocate violence because they advocate the impossible. To hold that they do outlaws, at a single stroke, all exhortations to seek the ideal in social and political life. Possible violent reaction does not justify suppression of the expression of views which may evoke it (Cf. *Near* v. *Minnesota*, 283 U. S. 697, *supra*, at p. 722; *New York Staats Zeitung* v. *Nolan*, 89 N. J. Eq. 387, 388).

The court below quotes from a book found in appellant's possession, entitled "Communism and Christianism" (R., 112). One copy of this book was found in appellant's room (R., 67). There was no proof that appellant had distributed this book or that it had been received by him from Party Headquarters. It contained 247 pages (R., 112), and it is unreasonable to suppose that he had received a volume of this size for distribution. It was not unlawful for him to have in his possession a book for personal reading, whatever the doctrine of the book might be. There is no room for inference that the book was put to any other use. Furthermore, the excerpts from the book quoted by the court below (R., 175) did not indicate that the author of the book considered that violence would be necessary to change the capitalist system. The excerpts state, in effect, that the working class must organize politically to acquire the powers of government. They indicate that a change in the political organism is necessary. The proposed change in the organism is expressed in figures taken from the activities of the husbandman, but the possible exaggeration in these figures does not change the fact that the author suggests that the changes be accomplished through political action. Many changes have been effected in the Constitution of the United States which might be described as an uprooting and replanting, if one chose to use those figurative terms. It is quite plain that the author felt that in some countries the change would not have to occur, as in Russia, through violence. The conviction can no more be sustained because the appellant

had in his possession a book of this character, than if it were based upon his possession of a copy of the Encyclopedia Brittanica, which contains many descriptions of revolution and economic and political doctrine. It is not to be inferred that men advocate violence because they read, or because their reading includes modern equivalents of the radicalism of Thomas Paine.

The court below referred to a document entitled "An Appeal to Southern Young Workers" (R., 112). There is nothing in this document which incited to violence or which added anything to the documents which we have already discussed. Reference to "smashing" the National Guard, the C. M. T. C. and R. O. T. C. is, of course, not to be taken literally. It is merely an expression in exaggerated language of a demand for the end of compulsory military training and of the maintenance of military establishments. It is part of the program of many established religious and charitable organizations. The appellant could not be properly penalized because the choice of words was inexact or even offensive. No one could reasonably suppose that the literature advocated a forcible collision with the armed forces of the State in an effort to remove them, because increase of membership and not suicide was the purpose of this Party literature. The court below considered that some of the statements necessarily imported the use of violence because in *Carr* v. *The State*, 176 Ga. 55, it had reached that conclusion in passing upon a demurrer to an indictment in which some of the phrases appearing in this literature were considered apart from their context. There was no justification for considering those phrases alone in the present case, and in their setting they do not bear that meaning.

The "Party Organizer", referred to by the court below, is not in the record (R., 113) and there is not the slightest basis for assuming that it contained any incitation to violence. Apparently only the summary appearing in the present record (R., 113) was before the court below. The court below states that "the literature fairly teems with

such expressions as 'confiscation', 'revolution', 'rebellion' and 'violence' * * *" (R., 177). Careful examination of all the documentary evidence discloses no direct or indirect advocacy of violence. The only use of the word is in "Communism and Christianism", and we have already pointed out that the conviction cannot depend upon anything appearing in that book.

Examination of the additional documentary evidence in the record, which is not specifically mentioned in the opinion of the court below, fails to disclose any advocacy of forcible resistance to the authority of the State of Georgia or achievement of the Party program by resort to violence. Taken as a whole, the documentary evidence can be regarded as stating only the general nature of the organization of the Communist Party and its program, particularly for the Southern States. It was plainly designed to obtain members for the Party to enable it to carry out its program in a lawful manner, and neither it nor appellant, through his possession or distribution of it, could be regarded as sounding the tocsin to violent revolt.

We believe that *Fiske* v. *Kansas*, 274 U. S. 380, *supra*, requires the conclusion that application of the statute to appellant violated the due process clause of the Fourteenth Amendment. The chief evidence offered against Fiske was the preamble to the constitution of the Industrial Workers of the World (set forth in Appendix A hereto). The preamble contained such expressions as: "There can be no peace so long as hunger and want are found among millions of the working people and the few, who make up the employing class, have all the good things of life." "Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system." "It is the historic mission of the working class to do away with capitalism. The army of production must be organized not only for the everyday struggle with capitalists, but also to carry on production when capitalism shall have been overthrown. By

organizing industrially we are forming the structure of the new society within the shell of the old." Certainly there was at least as much room for implication that these doctrines required the use of violence as there is in any of the documentary evidence in this case. There this Court, declining to accept the conclusion of the Supreme Court of Kansas that advocacy of violence could be inferred, decided that the court and jury were not warranted in drawing an inference that the document advocated achievement of the program through forcible and unlawful means. We believe that the case governs the decision here upon this point, and that in the absence of any proof that appellant, or the organization with which he was connected, advocated forcible resistance to the authority of the State, and, indeed, in view of indications in the Party literature that such forcible resistance was not contemplated, application of the statute to him and his conviction thereunder violated the due process clause of the Fourteenth Amendment and cannot stand.

POINT IV.

The Federal questions presented were properly raised in the court below, and this Court has jurisdiction on appeal.

Appellant contended, in his petition for rehearing in the court below, that the construction and application of the statute by the Supreme Court of Georgia rendered it invalid under the due process clause of the Fourteenth Amendment (R., 188-191). The petition for rehearing thus presented to the court below the three questions presented in the preceding points of this brief. The interpretation of the statute by the Supreme Court of Georgia in its first opinion was fundamentally different from that of the trial court under which the case was submitted to the jury (see pp. 7-8, *supra*). Apparently recognizing that construction of the statute to include conduct not amounting to a clear and present danger to the State would, under the *Schenck*

case, *supra*, render it invalid, the trial court construed the statute as requiring a finding by the jury that immediate serious violence against the State of Georgia was to be expected or was advocated. On the other hand, the original construction of the statute by the court below rendered immaterial both the immediacy of the violence advocated and the danger that violence should ensue at any time. The construction of the statute by the court below was in connection with its determination as to whether or not there was sufficient evidence to sustain the verdict. It must have concluded that the verdict could not be sustained upon the basis of the test applied by the trial court (as it clearly could not be), and that it could be sustained only by enlarging the scope of the statute as it did. Thus, the statute applied below imposed an entirely new and far more rigorous (although uncertain) standard of liability than that imposed by the statute as interpreted by the trial court. Obviously, an attack upon the validity of the statute, as construed by the appellate court, raises a Federal question which was not and could not have been raised in connection with the statute as construed by the trial court. On writ of error to the trial court, appellant was reasonably content to rest his case upon the sufficiency of the evidence as a matter of State law to meet the standard of liability enunciated in the charge and upon other questions raised at the trial which are not presented here. He was not required to anticipate and could not have anticipated in the trial court that the appellate court would not consider the sufficiency of the evidence under the standard laid down by the trial court, but instead would appraise its sufficiency under a new and unforeseen standard which is much more rigorous and which renders the statute invalid under the Fourteenth Amendment. The Federal question of the validity of the statute as interpreted and applied by the Supreme Court arose in that Court from its "unanticipated act" in giving the statute "a new construction which threatened rights under the Constitution" (*American Surety Co.* v. *Baldwin*, 287 U. S. 156, 164). It was, therefore, seasonably

presented upon the petition for rehearing. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673; *Missouri* v. *Gehner*, 281 U. S. 313; cf. *Saunders* v. *Shaw*, 244 U. S. 317; *Grannis* v. *Ordean*, 234 U. S. 385; *Great Northern R. Co.* v. *Sunburst Oil Ref. Co.*, 287 U. S. 358, 367; *American Surety Co.* v. *Baldwin*, *supra*.

The validity of the statute, as finally interpreted by the court below in its opinion denying the petition for rehearing, is accordingly properly before this Court. It is immaterial that the final interpretation modified somewhat that contained in the original opinion, for the final interpretation also effectively omits those material conditions of liability which made the statute innocuous as interpreted by the trial court, and, in addition, it renders the standard of liability so uncertain as to be incapable of enforcement.

It is likewise immaterial that the State court refused to consider the Federal questions in the petition for rehearing. It is not a condition of this Court's jurisdiction that the Federal questions be considered by the State court, but only that they be seasonably presented there. A claim of Federal right is denied "as well by the refusal of the state court to decide the question, as by an erroneous decision of it." (*Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282.) It would clearly have been futile, in view of the Court's refusal to consider the constitutional questions raised in the petition for rehearing, to file a second petition attacking the statute, as finally interpreted, on the grounds presented here.[61]

[61] Appellant's contention that the statute as construed in the *original* opinion of the Court below was so indefinite that it violated the due process clause was sufficiently presented on petition for rehearing in the challenge to the statute as repugnant to the due process clause. In its opinion upon rehearing the Court below declined to rule upon this and the other constitutional questions. The point here made is that the statute as *finally* construed in the opinion upon petition for rehearing contains no sufficiently definite standard of guilt. Obviously this point could not have been presented either upon the petition for rehearing or before and the point is, therefore, properly before this Court.

This Court has jurisdiction, on appeal, to determine whether a State statute, as construed and applied by the highest court of the State, is in conflict with the Federal Constitution (*Fiske* v. *Kansas*, 274 U. S. 380, 385-386; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 288-289), and where necessary to vindicate Federal rights, this Court will consider whether there is any evidence to support the conclusions of fact of the State court (*Fiske* v. *Kansas*, *supra*).

CONCLUSION.

Since the statute as construed by the court below, and as applied to appellant, violates the due process clause of the Fourteenth Amendment, and the questions presented are within the jurisdiction of this Court, this Court should reverse the judgment below and direct the discharge of the appellant from custody and the cancellation of his bail.

Respectfully submitted,

WHITNEY NORTH SEYMOUR,
Attorney for Appellant.

WALTER GELLHORN,
HERBERT T. WECHSLER,
CAROL KING,
of Counsel.

APPENDIX A.

The preamble to the constitution of the Industrial Workers of the World as it appears at page 15 of the record in *Fiske* v. *Kansas*, 274 U. S. 380, is as follows:

"The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of the working people and the few, who make up the employing class, have all the good things of life (fol. 27). Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system.

We find that the centering of the management of industries into fewer and fewer hands makes the trade unions unable to cope with the ever growing power of the employing class. The trade unions foster a state of affairs which allows one set of workers to be pitted against another set of workers in the same industry, thereby helping defeat one another in wage wars. Moreover, the trade unions aid the employing class to mislead the workers into the belief that the working class have interests in common with their employers.

These conditions can be changed and the interest of the working class upheld by an organization formed in such a way that all its members in any one industry, or in all industries, if necessary, cease work whenever a strike or lock-out is on in any department thereof, thus making an injury to one an injury to all.

Instead of the conservative motto, 'A fair day's wage for a fair day's work', we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system'.

It is the historic mission of the working class to do away with capitalism. The army of production must be organized not only for the everyday struggle with capitalists, but also to carry on production when capitalism shall have been overthrown. By organizing industrially we are forming the structure of the new society within the shell of the old."

INDEX

	PAGE
STATEMENT	1
SUMMARY OF ARGUMENT	5
ARGUMENT	11
I. This appeal should be dismissed, for lack of jurisdiction, because the federal claim now made was not seasonably presented in the State courts, and has not been passed upon by the State Supreme Court	11
II. The Georgia statute on "Attempt to Incite Insurrection," as construed, does not violate the due process clause of the Fourteenth Amendment by unlawfully infringing liberty of speech or assembly	26
III. The Georgia statute, as construed, is sufficiently definite and certain	42
IV. The Georgia statute, as applied in this case, does not violate the due process clause of the Fourteenth Amendment. (Discussion of evidence establishing that the communist party advocates force and violence)	47
CONCLUSION	66

TABLE OF CASES

PAGE

Abrams v. U. S., 250 U. S. 616 ..... 32, 33, 34, 35
American Surety Co. v. Baldwin, 287 U. S. 156 ..... 20, 23

Barrington v. Missouri, 205 U. S. 483 15
Boswell v. State, 114 Ga. 40 (2) 11
Bowe v. Scott, 233 U. S. 658 15
Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281, U. S. 673 (1) 17, 21
Brown v. New Jersey, 175 U. S. 172, 175 12
Brown v. State, 114 Ga. 60 (2) 13

Calif. Powder Wks. v. Davis, 151 U. S. 389, 393 14
Carr v. State, 176 Ga. 747 17
Carr v. State, 176 Ga. 55, 60 18
Cincinnati Railway v. Slade, 216 U. S. 78, 83 14
Citizens Nat. Bk. v. Durr, 257 U. S. 99, 106 19
Comm. v. Lazar, 103 Pa. Super. 417, 157 A. 701 65
Cox v. Texas, 202 U. S. 446 (3), (4) 11
Crowell v. Randell, 10 Pet. 367, 392 14

Debs v. U. S., 249 U. S. 211 ..... 32, 35
Dewey v. City of Des Moines, 173 U. S. 193 (2), 199 7
Dunaway v. Gore, 164 Ga. 219 (4), 230 13

Fiske v. Kansas, 274 U. S. 380 65
Fox v. Washington, 236 U. S. 273 ..... 7, 43, 44, 45, 47
. .nk v. Mangum, 237 U. S. 309 (2), 326 12

Ga. Constitution, Art. 6, sec. 2, par. 5 ..... 12, 14
Gibson v. State, 38 Ga. 571 41
Gilbert v. Minn., 254 U. S. 325 38
Gitlow v. New York, 268 U. S. 652 ..... 28, 29, 30, 31, 33, 35, 36, 42
Grannis v. Ordean, 234 U. S. 385 23

TABLE OF CASES—Continued

	PAGE.
Great Nor. Ry. Co. v. Sunburst Oil Co., 287 U. S. 358	23
Griggs v. State, 130 Ga. 16	11, 13
Griggs v. State, 126 Ga. 442 (2)	13
Hiawassee Power Co. v. Carolina-Tenn. Co. 252 U. S. 341, 343	14, 15, 16
Hurtado v. California, 110 U. S. 516	12
Hutchings v. Roquemore, 164 Ga. 637 (2)	13
International Harvester Co. v. Ky., 234 U. S. 216, 221	46
Lawrence v. State Tax Comm., 286 U. S. 276, 282	24, 26
Loeber v. Schroeder, 149 U. S. 580, 585	15
Mays v. State, 175 Ga. 260	13
McCorquodale v. Texas, 211 U. S. 432	15
Missouri ex rel. v. Gehner, 281 U. S. 313	19
Moore v. State, 126 Ga. 414 (1-a)	13
Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 308	12, 25
Nash v. U. S., 229 U. S. 373	45
New York v. Kleinert, 268 U. S. 646, 650	14
Patterson v. Bank of Alapaha, 148 Ga. 356	13
Peo. v. Lloyd, 304 Ill. 23, 136 N. E. 505	29, 47, 65
Peo. v. Ruthenberg, 229 Mich. 315, 325	47
Peo. v. Steelik, 187 Cal. 361, 372	47
Peo. v. Taylor, 187 Cal. 378, 203 P. 85	64
Peo. v. Whitney, 57 Cal. App. 449, 207 P. 698	37, 64
Pierce v. U. S., 252 U. S. 239	32, 33, 35
Pim v. St. Louis, 165 U. S. 273	15
Railroad Co. v. Rock, 4 Wall. 177, 180	14
Rogers v. Peck, 199 U. S. 425, 434	26
Saunders v. Shaw, 244 U. S. 317, 320	21, 22, 23

TABLE OF CASES—Continued

	PAGE
Schaefer v. U. S. 251 U. S. 466	32, 35
Schenck v. U. S., 249 U. S. 47	32, 33, 36
Southwestern Oil Co. v. Texas, 217 U. S. 114, 148	11
State v. Boloff, (Oregon, 1931) 4 P. 2nd, 326 (12)	65
State v. B'Gos, 175 Ga. 627, 630	19
State v. Hennessy, 114 Wash. 351, 364	46
State v. Holm, 139 Minn. 267, 166 N. W. 181 (2)	31, 38
State v. Laundy, 103 Ore. 443, 460	46
Stromberg v. Cal., 283 U. S. 359	66
Thomasson v. State, 22 Ga. 499 (1)	11
Twining v. New Jersey, 211 U. S. 78	12
U. S. v. L. Cohen Gro. Co., 255 U. S. 81, 89	46
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86	45
Whitney v. Cal., 274 U. S. 357, 368	7, 14, 35, 45, 65

MISCELLANEOUS CITATIONS

	PAGE
Doc. History of Reconstruction (Fleming)	39
Fish Committee Report, H. R. Doc. 2290	10, 61, 62
Lenin's Complete Works	10, 52, 65
Marx' Manifesto of Communist Party	10, 63
Reconstruction in Ga. (Thompson)	40
Report, Joint Comm. on Reconstruction	39-40
Report No. 2290, 71st Congress	10, 61
Report to the Senate (Hughes)	64
Schurz Report to Pres. Johnson (1865)	40
Short History of Ga. (Coulter)	40
Story on The Constitution, 5th ed., sec. 1880	30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 665

ANGELO HERNDON, *Appellant*

vs.

THE STATE OF GEORGIA, *Appellee*

BRIEF FOR THE APPELLEE

STATEMENT

This is an appeal from a decision of the Supreme Court of Georgia affirming a conviction of the appellant for the offense of "attempt to incite insurrection." The original opinion of the Supreme Court of Georgia is reported in 178 Ga. 832. (R., 141-179). Its opinion upon the denial of the petition for rehearing is reported in 179 Ga. 597. (R., 192-199).

The appeal was granted ex parte by the chief justice of the Supreme Court of Georgia and was filed in the Supreme Court of the United States Jan. 24, 1935. The Journal of the Court for Feb. 11, 1935, recites that "further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing of the case on the merits."

We shall therefore discuss first the jurisdictional question and then discuss the questions which appellant seeks to raise in this appeal.

The facts which we consider necessary to a consideration of the jurisdictional question are as follows: (We leave to a later part of this brief a statement of further facts and the evidence necessary to a consideration of the points advanced in the appeal.)

Appellant was indicted by the grand jury of Fulton county, Georgia, for a violation of Sec. 56 of the Penal Code of Georgia. (R., 5-9), which section provides:

> "Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection."

The indictment was returned July 22, 1932 (R., 9). On Jan. 16, 1933, before trial, Herndon filed a "motion to quash the indictment" (R., 9-10), upon four grounds, one of which was as follows:

> "4. That the statute upon which said unlawful indictment is based is in direct violation of the Constitution of the State of Georgia, paragraph 15, article 1, and of the Constitution of the United States."

This motion to quash the indictment was overruled by the trial judge on Jan. 16, 1933 (R., 10), before the trial. The verdict of conviction was rendered Jan. 18, 1933 (R., 9.)

(In appellant's brief we find no mention of this motion to quash the indictment for alleged unconstitutionality of the statute. It has an important bearing, however, upon the question as to whether the constitutional complaint later

presented in the motion for rehearing was seasonably presented or not.)

Following his conviction, Herndon filed a motion for new trial and later amended it with many special grounds. The motion for new trial was overruled July 5, 1933 (R., 40-41). A bill of exceptions was presented and certified by the trial judge on July 12, 1933 (R. 1-4). In this bill of exceptions Herndon assigned error upon the overruling of his motion for new trial, and also recited that he assigned error upon the overruling of his three preliminary pleadings, including his motion to quash the indictment.

On May 24, 1934, the decision of the Supreme Court of Georgia was rendered, affirming the conviction. (R., 141-

The Supreme Court of Georgia declared that the rulings upon the preliminary pleadings were not properly before it, because no exceptions to these rulings (nor exceptions pendente lite) had been filed within the time allowed by law. The decision considered various special grounds of the motion for new trial, holding that they were without merit, and also discussed the evidence at considerable length and held that the evidence was sufficient to authorize the conviction.

Thereafter, on August 20, 1934, counsel for appellant filed in the Supreme Court of Georgia a motion for rehearing, in which *the contention was again made that the Georgia statute in question violated the federal constitution.* This time the contention was presented in greater detail. The motion contended (R., 190) that the statute was "repugnant to the due process clause of the Fourteenth Amendment to the Federal Constitution." The motion then sought to give an excuse for not presenting this specific contention earlier. It was contended that the state supreme court had construed the statute differently from the trial judge's construction, and that this fact gave the movant the right to present the constitutional question as now advanced in the motion for rehearing for the first time. Movant also declared in the motion that he *could* not have presented earlier this contention that the statute violated the due process clause of the

federal constitution (thus ignoring the fact that he had contended in his "motion to quash the indictment" that the statute violated both the Georgia and the Federal constitutions.)

On Sept. 28, 1934, the Supreme Court of Georgia denied the motion for rehearing, (R., 192-199), 179 Ga. 597. The court did not pass upon the question of alleged unconstitutionality of the statute. With reference to this point, the opinion on denying the motion for rehearing calls attention to the fact that the Supreme Court of Georgia is a court "alone for the correction of errors" in inferior courts, and that the Supreme Court of Georgia *"would in no event have jurisdiction* to consider the merits of any question which is either intentionally or unintentionally omitted in the trial court." (See page 601 of 179 Ga.) (R., 197). The headnote by the Court on this point was as follows: (R., 192.)

> "2. This court will not pass upon the constitutionality of an act of the General Assembly unless it clearly appears in the record that the point was directly and properly made in the court below and distinctly passed on by the trial judge."

Following the rendition of the above decision, appellant presented a petition for appeal (R., 201) assigning error on the *failure* of the Supreme Court of Georgia to decide the question as to the constitutionality of Section 56 of the Penal Code of Georgia (assignments 1 to 4), and upon the *failure* of the court to hold that Section 56 was unconstitutional, etc. (assignments 12 to 20). Appellant included in his assignments, however, some paragraphs assigning error on the purported ground that the state supreme court had held that Section 56 was not unconstitutional (assignments 5 to 10, R. 202), *when in fact the State Supreme Court made no such ruling whatever.* Now, in the brief filed by appellant in the Supreme Court of the United States, he abandons the assignments first above referred to (assignments 1 to 4, and 12 to 20), upon the recital of which he obtained the state chief justice's allowance of the appeal, and recites in his brief that he relies upon the other assignments (which

were assignments 5 to 10), *thus seeking to submit to the United States Supreme Court questions which were not even decided by the state supreme court.* (See p. 9-10 of appellant's brief.)

SUMMARY OF ARGUMENT

I.

THIS APPEAL SHOULD BE DISMISSED, FOR LACK OF JURISDICTION, BECAUSE THE FEDERAL CLAIM NOW MADE WAS NOT SEASONABLY PRESENTED IN THE STATE COURTS, AND HAS NOT BEEN PASSED UPON BY THE STATE SUPREME COURT.

In this division of our brief we point out that the Supreme Court of Georgia was without jurisdiction to decide the federal constitutional question which appellant attempted to raise in the motion for rehearing. This is based upon the provisions of the Constitution of Georgia and many decisions applying it.

To give the Supreme Court of the United States jurisdiction of an appeal from a state court it must appear affirmatively that a Federal question was seasonably presented in the state court and actually decided by the highest court of the state having jurisdiction or that the judgment as rendered could not have been given without deciding it.

It is too late to raise a Federal question for the first time in a petition for rehearing in a state supreme court after that court has pronounced its final decision.

While there are a few exceptions to the general rule that a Federal question cannot be raised for the first time in a petition for rehearing in a state supreme court, this case does not come under any of the exceptions.

The decision of the Georgia supreme court in construing this statute was not such "unanticipated ruling" as would nullify the foregoing rule in this instance.

The decision of the Georgia supreme court in construing

this statute was not at variance with any construction formerly adopted by it, but was in line with previous expressions of that court.

Cases cited by appellant on the jurisdictional question are discussed and distinguished.

Federal cases hold that the proper time to raise a Federal question is in the trial court whenever that is required by the State practice.

Appellant could have raised the present federal question in the trial court, as illustrated by the fact that he did in fact present there a motion to quash on ground of alleged unconstitutionality of the statute, which contention was lost to him (a) by being too vague and (b) by not being preserved by timely exceptions.

Motion to quash the indictment, or demurrer, was the proper way to attack the constitutionality of the statute under which appellant was indicted.

II.

GEORGIA'S STATUTE ON "ATTEMPT TO INCITE INSURRECTION," AS CONSTRUED, DOES NOT VIOLATE THE "DUE PROCESS CLAUSE" OF THE FOURTEENTH AMENDMENT BY UNLAWFULLY INFRINGING LIBERTY OF SPEECH OR ASSEMBLY.

Utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the police power of the legislature.

Section 56 of the Georgia code is not one making any particular utterance criminal, but it penalizes the use of any language when used under such circumstances and with such intent as to constitute an actual attempt to incite an insurrection. The imminence of the planned insurrection is not a necessary element.

"Dangerous tendency" is the test applied in many federal and state decisions, in deciding whether the penalizing of cer-

tain language amounted to unconstitutional abridgement of freedom of speech.

"Clear and present danger," as a test, has not been followed by the line of federal decisions.

III.

THE GEORGIA STATUTE, AS CONSTRUED, IS SUFFICIENTLY DEFINITE AND CERTAIN.

The statute definitely informs a person that he must not attempt to incite others to combined resistance by force to the lawful authority of the State, when he intends that such force shall come at some time as a direct result of his influence upon those whom he attempts to incite.

Supreme Court has upheld a statute penalizing the printing of an article that tends to encourage or incite the commission of crime or acts of violence, or which tends to encourage or advocate disrespect for law. *Fox v. Washington*, 236 U. S. 273.

Georgia statute is more definite than the California statute which was upheld against contention of unconstitutionality for vagueness in *Whitney v. California*, 274 U. S. 357, 368.

Other state decisions cited have upheld criminal syndicalism statutes against this contention,—some less specific than the California statute.

IV.

THE GEORGIA STATUTE, AS APPLIED IN THIS CASE, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Herndon was shown to have come to Atlanta as a paid organizer for the communist party. He was engaged in working up an organization for the party in Atlanta, had actually obtained some members, had called and conducted some meetings in the interest of furthering the organization,

had seized upon a condition of unemployment and unrest to call forth and produce a mass demonstration of unemployed people, white and colored, demanding increased appropriations for "relief" from county authorities, this not being done through any interest in helping such unemployed persons but merely as a means to an end, to-wit: furthering the organization of the communist party which he was paid to organize.

When arrested he had in a box under his arm nine membership books in the communist party and a number of pamphlets and booklets which set forth the aims and plans of the communist party. The membership books set forth the conditions upon which members were accepted and the agreements that the members made upon joining the party, among these being the agreement to "accept the program and statutes of the Communist International and the Communist Party of the U. S. A." and the agreement that the members would subordinate themselves "to all decisions of the comintern and of the party" (the comintern being shown by the literature to be the executive committee of the party). The authenticity of the literature was proven and was effectually admitted by the defendant.

One of the documents thus found in the defendant's possession was a booklet entitled *"The Communist Position on the Negro Question,"* which explained in detail the meaning of the communist slogan: *"Self-Determination for the Black Belt"* (which slogan appeared in the title lines of the communist daily newspaper put in evidence and in the numerous other communist certificates and pamphlets). This slogan was declared in above booklet to represent the aim, purpose and demand of the communist party in the southern states, and was shown to include the following:

1st—That all land owned by the "southern white landlords" in this black belt be confiscated and turned over to the negroes.

2nd—That the present state boundaries, established for the convenience of the "white master class," be broken up and the state unity of the black belt established.

3rd—That in this black belt the negroes be given the com-

plete right of self-determination; *the right to set up their own government,* and the right to separate from the United States, if they wish.

This booklet had a map on the outside, showing that this so-called black belt extended through portions of Arkansas, Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina and Virginia. (See document 13, R. 102, for photographic reproduction of this map.)

The booklet also contained resolutions adopted by the Communist International ordering the Communist party of the U. S. A. to adopt the above plan of "self-determination of the negroes in the black belt" as a program in the southern states. These resolutions declared that the party members should not limit themselves to propaganda for the "right of self-determination" but should *"orgunize mass actions such as demonstrations, strikes, tax boycott movements, etc."* The resolutions teemed with such words as "revolution" and "revolutionary," and said that this was a slogan of "national rebellion."

The resolutions closed with the declaration that the constant call of the communists to the negro masses must be: *"Revolutionary struggle against the ryling white bourgeoisie, through a fighting alliance with the revolutionary white proletariat."*

Other portions of the booklet, and other documents in the evidence, showed that the American communist party was obeying the orders thus given it by the Communist International and was actively trying to incite the negroes in the south to accomplish the above stated aims.

The literature contained also the usual and better known communist principles and slogans, such as: "Against capitalist terror"; "For the defense of the Soviet Union"; "The communist party incorporates the whole body of experience of the proletarian struggle, basing itself upon the revolutionary theory of Marxism."

One of the pamphlets was a publication of the "Young Communist League" containing such incitements as *"Smash the National Guard, the C. M. T. C. and R. O. T. C."*

(All of the documents placed in evidence and above referred to were found in the box under Herndon's arm when he was arrested. R., 92. Some other documents and bundles of papers were referred to in testimony as being found in his room, but these were not actually introduced in evidence, as the record shows.)

(The above is far from complete as a summary. The outline contained under division IV of this brief will give a better idea of the evidence. The transcript of the record, from R. 56 to 125, gives a complete view.)

We submit that the evidence in this case shows that Herndon was actually engaged in attempting to incite an insurrection, as defined and penalized by the Georgia statute, since he was actively engaged in organizing a branch of the communist party in Atlanta, and since the "party" was shown definitely by its authentic literature to advocate the forceful overthrow of the lawful authority of the State by revolution or rebellion, the seizure of all land in the black belt belonging to white people, the abolition of the present state borders and the setting up of a new state or nation out of parts of Georgia and other states with sole control by negroes.

Appellant's argument that it is possible to imply only a peaceful meaning to such words as "revolution," "rebellion," "mass action," "tax boycott movements," "violence," "confiscation," and "revolutionary," is answered by citing the Fish Committee Report to the 71st Congress, House of Representatives Document 2290, Jan. 17, 1931, "Lenin's Complete Works," and Karl Marx' Manifesto of the Communist Party, all showing that the intent of the communists is not peaceful but forcible overthrow of governments.

Cases cited by appellant in this connection discussed and distinguished.

ARGUMENT

I.

THIS APPEAL SHOULD BE DISMISSED, FOR LACK OF JURISDICTION, BECAUSE THE FEDERAL CLAIM NOW MADE WAS NOT SEASONABLY PRESENTED IN THE STATE COURTS, AND HAS NOT BEEN PASSED UPON BY THE STATE SUPREME COURT.

Ground No. 4 of the motion to quash the indictment, which was presented to the trial court, raised in a proper manner the contention that the statute under which Herndon was indicted violated the Constitution of Georgia; it specified the section of the Georgia constitution which the defendant claimed was violated by the statute. But as to the question of violating the Federal constitution, the motion to quash was insufficient because it did not specify any particular provision or section of the Federal constitution. *Cox v. Texas*, 202 U. S. 446 (3), (4); *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 118; *Dewey v. City of Des Moines*, 173 U. S. 193 (2), 199.

This rule applies not only in Federal procedure but in Georgia procedure. *Griggs v. State*, 130 Ga. 16.

The motion to quash the indictment for alleged unconstitutionality of the statute upon which the indictment was founded was equivalent to a demurrer to the indictment on that ground [*Thomasson v. State*, 22 Ga. 499 (1)], and was therefore a proper vehicle for raising the question of alleged unconstitutionality of the statute. *Boswell v. State*, 114 Ga. 40 (2).

If the motion to quash the indictment had been definite in alleging that the statute violated some specific provision of the Federal constitution, and if such contention had been then passed upon by the trial judge, preserved by timely exceptions, and finally passed upon by the state supreme court, then the Federal question could have been brought to the United States Supreme Court for review.

But in addition to the indefiniteness of the Federal complaint in the trial court, the overruling of the motion to quash the indictment was not properly preserved by exceptions (or exceptions pendente lite) within the time limit allowed by the Georgia laws, and therefore the Supreme Court of Georgia held that the ruling upon the motion to quash the indictment was not properly before it for review. (R., 141, 145.)

Of course the state laws on procedure, when not themselves violative of the Federal constitution, are given full recognition by the Federal courts.

"The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal constitution." *Brown* v. *New Jersey*, 175 U. S. 172, 175. See also *Twining* v. *New Jersey*, 211 U. S. 78; *Hurtado* v. *California*, 110 U. S. 516; *Frank* v. *Mangum*, 237 U. S. 309 (2), 326; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 308.

STATE SUPREME COURT WAS WITHOUT JURISDICTION TO DECIDE CONSTITUTIONAL QUESTION NOT PROPERLY RAISED IN LOWER COURT

Therefore, when the appellant presented in his motion for rehearing in the Supreme Court of Georgia the contention that Section 56 of the Georgia Penal Code was violative of the "due process clause" of the Fourteenth Amendment to the Federal constitution, the Supreme Court of Georgia properly held that this question had not been presented in the trial court and hence was not within the jurisdiction of the Supreme Court for review. Article 6, section 2, paragraph 5, of the Constitution of Georgia, provides:

> "The Supreme Court shall have no original jurisdiction, but shall be a court alone for the trial and correction of errors of law from the superior courts and the city courts of Atlanta and Savannah, and such other like

courts as have been or may hereafter be established in other cities. . . ."

In *Dunaway vs. Gore*, 164 Ga. 219 (4), 230, the Supreme Court of Georgia cited the above constitutional provision and declared: "Indeed, it may be said that under the provision of our constitution, art. 6, sec. 2, par. 5 (Code, §6502), which provides that the Supreme Court shall be a court alone for the correction of errors, that this court would in no event have jurisdiction to consider the merits of any question which is either intentionally or unintentionally omitted in the trial court."

In *Griggs vs. State*, 126 Ga. 442 (2), it was held: "The constitutionality of a statute can not be questioned in this court when it does not appear that such question was made in the lower court."

In *Hutchings v. Roquemore*, 164 Ga. 637 (2), the Supreme Court of Georgia, in refusing to pass upon a constitutional question first raised in the bill of exceptions, referred to the fact that it was "without jurisdiction" to pass upon the constitutional question since it was not presented to the lower court for decision first.

In *Patterson vs. Bank of Alapaha*, 148 Ga. 356, the Court declared: "We are of the opinion that the Supreme Court has no jurisdiction of this case," because it appeared from inspection of the record that the constitutional question sought to be raised had not been first presented in the trial court.

The principle has been applied repeatedly, in criminal as well as civil cases. See also: *Brown vs. State*, 114 Ga. 60 (2); *Griggs vs. State*, 130 Ga. 16; *Moore vs. State*, 126 Ga. 414 (1-a); *Mays vs. State*, 175 Ga. 260.

Therefore, we may take it as thoroughly established under the Georgia procedure, decisions and state constitution, that when a person is convicted of violating a Georgia statute and carries his case by bill of exceptions to the Supreme Court of Georgia, the latter court has no jurisdiction to decide the constitutionality of the statute involved unless the specific constitutional question was raised in the trial court and a

decision there invoked upon the question, and the point preserved by timely exceptions.

Since the record in the present case clearly shows that no specific Federal constitutional question was raised in the trial court, and that the Supreme Court of Georgia did not decide the constitutional question made in the motion for rehearing because of lack of jurisdiction, as set forth in the foregoing decisions, it follows that the present appeal should be dismissed by the Supreme Court of the United States, under the authority of the following cases:

U. S. SUPREME COURT DECISIONS REQUIRING DISMISSAL

In *California Powder Works v. Davis*, 151 U. S. 389, 393, it was held: "It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

In *Whitney vs. California*, 274 U. S. 357, 360, it was declared: "It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court." (citing:)

Crowell v. Randell, 10 Pet. 367, 392;

Railroad Co. v. Rock, 4 Wall. 177, 180;

Hiawassee Power Co. v. Carolina-Tenn. Co., 252 U. S. 341, 343;

Cincinnati Railway v. Slade, 216 U. S. 78, 83;

New York v. Kleinert, 268 U. S. 646, 650.

In the *Hiawassee Power Company* case, supra, Justice Brandeis said (page 343 of decision) that "the basis for a review by this court is wholly lacking here," because in the assignment of errors which carried the case to the State supreme court no mention was made of any Federal constitutional point and there was in fact no decision by the State supreme court upon the subject, although the plaintiff in-error had raised the Federal constitutional point in presenting an objection to evidence in the trial court.

In *Barrington vs. Missouri*, 205 U. S. 483, (an appeal from a murder conviction in state court), it was held that a claim for constitutional protection from the admission of testimony procured by the sweat-box method, raised for the first time in a petition to the state supreme court for a rehearing, comes too late to sustain the appellate jurisdiction of the Federal Supreme Court over the State court.

In *McCorquodale vs. Texas*, 211 U. S. 432, in dismissing a writ of error from the Texas court in a murder conviction, in which the appellant had sought to raise a Federal constitutional question for the first time in the motion for rehearing in the state appellate court, the Court said: "This court has decided many times that it is to late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a state after that court has pronounced its final decision." (citing:) *Loeber v. Schroeder*, 149 U. S. 580, 585; *Pim v. St. Louis*, 165 U. S. 273.

In *Bowe v. Scott*, 233 U. S. 658, (where the writ of error was dismissed for want of jurisdiction), it was held that a contention involving constitutional rights, made in a petition for rehearing after judgment in the lower court had been affirmed, was raised too late to give the Federal Supreme Court jurisdiction to review the case unless the state court considered and passed upon the Federal question therein relied upon.

The latter part of the above ruling, while presenting an exception to the general rule stated in the preceding decisions, has no application to the present case, as the Georgia Su-

preme Court *did not* consider and pass upon the Federal question first raised in the motion for rehearing,—holding that it was without jurisdiction to pass upon the question when raised at that stage of the proceedings.

DECISION OF GA. SUPREME COURT NOT SUCH "UNANTICIPATED RULING" AS WOULD NULLIFY THE FOREGOING RULE IN THIS INSTANCE

As we gather the contention of appellant on this jurisdictional question, he admits the existence of the foregoing established rule against the initial raising of a Federal constitutional question in a motion for rehearing in a state court. He contends, however, that although that rule may apply generally it does not apply in this case. He points out that the Supreme Court of Georgia in his decision, (*Herndon v. State*, 178 Ga. 832) placed a construction upon the statute he was charged with violating (section 55) that was different from a construction placed by the trial judge in a quoted extract of his charge to the jury. He claims, therefore, that he could not have anticipated this construction by the State supreme court and hence could not have raised in the trial court the question of the constitutionality of the statute.

The principal fallacy in this argument lies in the fact that appellant not only *could* have raised the Federal constitutional attack upon the statute in the trial court, but *did actually* attempt to do so, by filing a motion to quash the indictment, attacking the indictment as violative of the Federal constitution in language which we have shown was too vague and indefinite to properly raise the question, and not presenting the specific contention that the statute violated the due process clause of the Fourteenth Amendment.

Thus it is totally incorrect to argue that the judge's charge to the jury (which came at the close of the trial) was responsible for the failure of the defendant to advance in the trial court the constitutional complaint against the statute which he later presented in the motion for rehearing. The

charge had not been delivered when the time for demurring to the indictment or moving to quash it was at hand.

No adequate reason is given as to why Herndon did not raise in the lower court, by demurrer or motion to quash the alleged unconstitutionality of the statute under the "due process clause" of the Fourteenth Amendment. There was nothing to prevent him, if he had so desired. As said by the Supreme Court of Georgia in denying the motion for rehearing in Herndon's case:

> "Regardless of the construction placed upon this statute either by the trial court or by this court, the defendant could have presented to the court below the construction which he deemed to be the proper one and in connection therewith could have attacked the statute upon any chosen constitutional ground."

This case is easily distinguishable from the decision in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673 (1), where the Court held: "A Federal question raised for the first time on petition for rehearing in the highest court of the state is raised in time, where it is presented by a construction placed upon a statute by such court in its decision, *at variance with a construction formerly adopted by it.*" No such situation is presented here. No former decision of the Georgia supreme court is in conflict with the decision here complained of. Appellant points out no decision of the Georgia supreme court conflicting even in spirit with the decision in Herndon's case. And the fact is the Herndon decision is *in line with* the previous expressions of the Georgia Supreme Court.

HERNDON DECISION IN LINE WITH PREVIOUS EXPRESSIONS OF GEORGIA SUPREME COURT

In *Carr vs. State*, 176 Ga. 747, the Supreme Court of Georgia had up for decision the constitutionality of this same statute. Carr was indicted in 1932 for violating the same statute that Herndon was convicted of violating, section 56

of the penal code of Georgia. Carr filed a demurrer to the indictment in which he contended, among other things, that said statute is violative of the section of the constitution of Georgia which has reference to the guarantee of liberty of speech and of the press, and also violative of the "due process clause" of the 14th Amendment to the constitution of the United States.

In deciding against this contention and upholding the constitutionality of the statute, the Georgia Supreme Court quoted the following language from an earlier case:

> "It (the State) can not reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace *or imminent and immediate danger of its own destruction.* 'Manifestly the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government, *without waiting until there is a present and imminent danger of the success of the plan advocated.*'" (176 Ga. 750.)

The earlier case where above language also appears is *Carr v. State*, 176 Ga. 55, 60.

Thus it is seen that the Georgia Supreme Court, in construing and passing upon the constitutionality of the same statute that Herndon now attacks, adopted language so similar to the language used in the Herndon decision that it cannot reasonably be contended that there is any conflict or variance between the two decisions.

Every trial lawyer and judge knows that in the trial of criminal cases "requests to charge" are often presented which the judge believes express the law more favorably to the defendant than he is entitled to, and yet the trial judge sometimes accedes to the request and gives the charge as requested, merely out of an abundance of precaution.

Since the trial judge in Herndon's case included in his charge the statement that "in order to convict the defendant, gentlemen, it must appear clearly by the evidence that imme-

diate serious violence against the State of Georgia was to be expected or advocated," which was more favorable to the defendant than he was entitled to, under the Georgia statute and decisions, we may reasonably conclude that the judge was merely acceding to the request to so charge, out of an abundance of precaution exercised in the defendant's favor.

The defendant's written "requests to charge" are embodied in the record (R., 137-138), showing that the extracts in question got into the judge's charge by special request. (In Georgia the State has no appeal from an error committed in favor of a defendant in a criminal trial. *State v. B'Gos*, 175 Ga. 627, 630, and citations.)

OTHER CASES CITED BY APPELLANT DISTINGUISHED

Appellant cites, on page 61 of his brief, *Missouri ex rel. v. Gehner*, 281 U. S. 313. But in this case the lower judicatory, the state board of tax equalization, had decided that a certain statute of the State of Missouri, §6386, was unconstitutional and void, whereupon the Missouri supreme court came along and held the section valid. The relator, who had become the appellant, then filed a motion for rehearing in which the contention was made that the statute, §6386, was violative of the Federal constitution in certain respects. The motion for rehearing was denied, without reference to the Federal questions raised therein. An appeal was then allowed and considered by the Supreme Court of the United States. In assuming jurisdiction of the appeal the decision says: (p. 320.)

> "1. It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the state. Ordinarily it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more. *Citizens Nat. Bank vs. Durr*, 257 U. S. 99, 106. But here the company, at the first opportunity, invoked the protection of the Federal Constitution and statute. *It could not earlier have assailed*

the section as violative of the Constitution and laws of the United States."

The italicized portion above (italics ours) is of the very gist of the decision. Manifestly the decision is no precedent for the present appeal unless it may likewise be said, of Herndon: "he could not earlier have assailed the section as violative of the Constitution and laws of the United States." This cannot be said in the present case, because without doubt Herndon could have filed through his counsel a demurrer or motion to quash, assailing the statute under which he was indicted as violative of the due process clause of the Fourteenth Amendment.

Another case cited by appellant in his brief is *American Surety Company vs. Baldwin*, 287 U. S. 156. This was evidently cited for some bits of language embodied in the opinion. But if the ruling itself is considered it will be found to support squarely the position of appellee on the jurisdictional question in this case. The headnotes of the *American Surety Company* case are:

1. "A writ of certiorari to review a judgment of a state court will be dismissed where the Federal claim was not seasonably made in the state court.

2. "A claim that a judgment of a state court is void under the due process clause of the Fourteenth Amendment as having been entered without notice and opportunity to be heard is not seasonably made, so as to serve for a basis of review in the Supreme Court of the United States, where first raised by a *petition for rehearing* of an appeal to the highest court of the state from an order of a lower court setting aside the judgment, the claim of want of notice having previously been raised throughout the proceedings solely as a matter of state law."

The decision, pages 163-164, says:

"The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous

contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. *The Federal claim there made cannot serve as the basis for review by this court.* The contention that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of state law. *There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment.*"

Following are the extracts from this decision for the benefit of which the present appellant apparently cites the *American Surety Company* case:

"This is not a case where, as in *Saunders v. Shaw*, 244 U. S. 317, 320, the federal claim arose from the unanticipated disposition of the case at the close of the proceedings in the State Supreme Court. . . .

"Nor is the federal claim based, as in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 678, upon the unanticipated act of the State Supreme Court in giving to a statute a new construction which threatened rights under the Constitution."

By the expression "giving to a statute a *new* construction," the Supreme Court of course meant a construction *"at variance with a construction formerly adopted by it."* (See discussion of the *Brinkerhoff-Faris* case, supra). As previously pointed out in connection with our discussion of that case, it cannot be contended that the Georgia Supreme Court's decision in the *Herndon* case is "at variance" with any previous construction of the statute by the Georgia Supreme Court.

By inspecting *Saunders vs. Shaw*, 244 U. S. 317, (referred to in above extract from the *American Surety Company* case), we may see what the Supreme Court meant by an "unantici-

pated disposition of the case at the close of the proceedings in the state supreme court." The appellant (originally the intervenor) had objected to certain evidence tendered by the plaintiff in the trial court, and the trial judge had sustained the objection. The intervenor won the case in the trial court. The original plaintiff then appealed to the state supreme court and assigned error upon the above mentioned ruling. The state supreme court first affirmed the judgment, and then upon granting a rehearing reversed its position, held that the evidence in question was admissible, and ordered the injunction granted to the plaintiff as he had originally prayed, upon the strength of the evidence which had been excluded in the lower court. This sudden reversal of position by the state supreme court left the intervenor in the position of losing his case without having had an opportunity to present evidence to rebut the plaintiff's evidence which had been ruled in the trial court inadmissible. The intervenor filed a motion for rehearing in the state supreme court, but this was denied under a rule of court which provided that only one rehearing should be granted. The intervenor then appealed, by writ of error, to the Supreme Court of the United States, contending that the *action* of the state supreme court amounted to a denial of "due process of law" as to him, in violation of the Fourteenth Amendment. This contention was sustained, in the above decision. It was held that the "act of the state supreme court, done unexpectedly at the end of the proceeding," when the appellant could not get a consideration of his evidence which might rebut his opponent's evidence, amounted to a denial of due process of law as guaranteed by the Fourteenth Amendment. No statute was held unconstitutional, but merely an act of the judicial branch of the state government.

By the above outline of the case of *Saunders vs. Shaw*, it is clearly seen that the constitutional question presented to the Supreme Court of the United States could not possibly have been presented earlier,—because the action of the state supreme court (which act was held unconstitutional) did not

take place earlier. Therefore the case is not in any sense parallel to the case now at bar, and is no authority for allowing Herndon to attack the constitutionality of the statute under which he was indicted after his conviction thereunder had been affirmed by the state supreme court.

Appellant on page 61 of his brief also cites the case of *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358. In this case the jurisdiction of the United States Supreme Court was questioned because the federal constitutional question was raised first in a motion for rehearing in the state supreme court. The decision holds that the United States Supreme Court had jurisdiction in the appeal because the petitioner could not have made the constitutional point which was considered by the United States Supreme Court until after the decision rendered by the state supreme court. In fact the question actually considered in this decision was "the constitutional validity of the ruling" of the state supreme court. The decision therefore comes within the same category as the case of *Saunders v. Shaw*, supra, being a complaint that the judicial department of the state had denied due process of law to the appellant by a "ruling." See the following language at the close of the opinion in the *Great Northern Railway* case:

> "We have seen that the assault upon the judgment is made along two lines. The first is a challenge to the constitutional validity of the ruling in the *Doney* case, and involves a misconception of the decision in *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.* *The second is a challenge to the constitutional validity of the ruling in this case whereby the statute is adjudged to mean one thing for some cases and another thing for others. This latter objection the petitioner could not make in advance of the event.*"

In *Grannis v. Ordean*, 234 U. S. 385, which is the only other case cited by appellant on this particular point, it appears that the Federal constitutional question was first presented in the motion for rehearing in the state supreme court,

and that "the state supreme court entertained the petition, considered and overruled the contention that petitioner's rights under the Amendment were infringed, declaring that its decision was to be interpreted as holding against the contention." Since the Federal constitutional question had thus been expressly decided by the state supreme court, it was held that the United States Supreme Court had jurisdiction of an appeal from the ruling.

This decision was therefore directly in line with the decision in *Whitney v. California*, quoted earlier in this division of our argument, wherein it was held that "this Court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court."

FAILURE OF STATE COURT TO DECIDE CONSTITUTIONAL POINT NOT EQUIVALENT TO DECIDING AGAINST IT WHEN BASED UPON LACK OF JURISDICTION

Only one question remains for discussion, under this jurisdictional point: Is the failure of the Georgia supreme court to decide the Federal constitutional point advanced in the motion for rehearing equivalent to ruling against it? Appellant cites on this (on page 61 of his brief) only the case of *Lawrence vs. State Tax Commission*, 286 U. S. 276, 282, as authority for the argument that "a claim of Federal right is denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it."

Inspection of that case shows two important things to be considered: (a) the Federal constitutional point was made by Lawrence in his original suit against the Mississippi Tax Commission to set aside the tax assessment against him (see report of the state supreme court's decision in 162 Miss. 338, 137 So. 503, and page 279 of the United States Supreme Court's decision); and (b) the Mississippi supreme court

did not refuse to pass on the Federal question because of any lack of jurisdiction to do so, but because it held that a decision of the Federal point was unnecessary in view of other grounds upon which it placed its decision. These "other grounds" were held by the Supreme Court of the United States to be *"unsubstantial and illusory"* (page 282-283). And the decision of the Mississippi supreme court was therefore held to be equivalent to deciding against the Federal constitutional point which Lawrence had properly advanced. The decision says: (p. 282.)

> "But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is *properly* invoked. Even though the claimed constitutional protection be denied on non-Federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided."

This was vastly different from the situation in the present case, where the Supreme Court of Georgia pointed out that it was "without jurisdiction" (under the constitution of Georgia) to decide the Federal question presented in the motion for rehearing for the reason that this Federal question (being a contention that the statute under which the indictment was returned was violative of the Fourteenth Amendment) had not been presented in the trial court first for determination. There is nothing "unsubstantial and illusory" in that. The decisions which we have previously cited in this division of our brief thoroughly establish that the proper time to raise a Federal question is in the trial court, whenever that is required by the State practice. (*Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, 308.)

The provision of the Georgia constitution which limited the jurisdiction of the Georgia supreme court to questions properly raised in the inferior courts of the state (quoted

above in this division of our argument) certainly did not itself violate the "due process clause" of the Fourteenth Amendment. It has been held by the Supreme Court of the United States that a state has the right to determine for itself the courts in which crime may be prosecuted, and the appellate tribunals, if any, to which such causes may be carried. *Rogers v. Peck*, 199 U. S. 425, 434-435.

Therefore, since the refusal of the Georgia supreme court to decide the Federal question advanced by Herndon in his motion for rehearing was based upon *lack of jurisdiction*, which we have shown in this brief was in accordance with the constitution and laws of the State of Georgia, the case is not one where the decision of the state supreme court is equivalent to ruling against the Federal constitutional contention, and the decision in *Lawrence v. State Tax Commission*, supra, is not applicable.

We conclude, therefore, that this appeal should be dismissed, for lack of jurisdiction, because the Federal claim now made was not seasonably presented in the state courts, and has not been passed upon by the state supreme court.

II.

GEORGIA'S STATUTE ON "ATTEMPT TO INCITE INSURRECTION," AS CONSTRUED, DOES NOT VIOLATE THE "DUE PROCESS CLAUSE" OF THE FOURTEENTH AMENDMENT BY UNLAWFULLY INFRINGING LIBERTY OF SPEECH OR ASSEMBLY.

We come now to a discussion of appellant's contention that the Georgia statute, penal code sec. 56, penalizing "Attempt to Incite Insurrection," as construed by the Supreme Court of Georgia, violates the "due process clause" of the Fourteenth Amendment to the Constitution of the United States.

The construction which appellant contends gives to the Georgia statute the tinge of unconstitutionality is set forth in the following language of the Georgia Supreme Court's decision in the *Herndon* case:

"The statute means then that any attempt to induce others to come together in any combined resistance to the lawful authority of the State shall constitute an attempt to incite an insurrection and shall be punishable as stated. It is immaterial whether the authority of the State was in danger of being subverted or that an insurrection actually occurred or was impending. . . . " (178 Ga. 854.)

"Force must have been contemplated, but, as said above, the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but it would be sufficient that he intended it to happen at any time, as a result of his influence, by those whom he sought to incite. It was the intention of this law to arrest at its incipiency any effort to overthrow the State government, where it takes the form of an actual attempt to incite others to insurrection. . . . " (178 Ga. 855.)

(*On Motion for Rehearing*:) "Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen *at any time within which he might reasonably expect his influence to continue to be directly operative* in causing such action by those whom he sought to induce. . . . " (179 Ga. 600.)

It will be noted that the Georgia statute is not one making any particular utterance criminal, but it penalizes the use of *any language* when used under such circumstances and with such intent as to constitute an actual attempt to incite an insurrection.

Appellant contends, in effect, that the Constitution of the United States guarantees to him the right to use any language he wishes, even though it be used under such circumstances and with such intent as to constitute an actual attempt to incite an insurrection, unless there is a "clear and present danger" of his succeeding in his attempt to incite an insurrection. And since the Georgia statute, as construed by the state supreme court, does not make "probable success" of the insurrectionary attempt an essential ingredient of the offense, appellant contends that the Georgia statute is violative of the federal constitution.

RIGHT OF FREEDOM OF SPEECH NOT UNLAWFULLY ABRIDGED

We could phrase no more forceful language to answer this contention than the following oft quoted words from the decision of the United States Supreme Court in the case of *Gitlow vs. New York*, 268 U. S. 652:

> "That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. *And the immediate danger is none the less real and substantial because the effect of a given utterance can not be accurately foreseen.* The State can not reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale.
>
> "A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It can not be said that the State is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extin-

guish the spark without waiting until it has enkindled the flame or blazed into the conflagration. *It can not reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction;* but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."

At this point the *Gitlow* decision (p. 669-670) cites the following language from *People v. Lloyd*, 304 Ill. 23, 136 N. E. 505; 512:

"Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government *without waiting until there is a present and imminent danger of the success of the plan advocated.* If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law."

The case of *People v. Lloyd*, supra, which was cited approvingly in more than one place in the *Gitlow* decision, was a conviction in 1920 of thirty-nine members of the Communist Labor party under the Illinois statute which made it an offense for any person "openly to advocate by word of mouth or writing the reformation or overthrow by violence or any other unlawful means of the representative form of government now secured to the citizens of the United States and the several states by the constitution of the United States and the constitutions of the several states," etc. The gist of the ruling, insofar as applicable to the *Gitlow* case and to the case now at bar, is:

(6) "The Legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government, *without waiting until there is a*

present and imminent danger of the success of the plan advocated."

Justice Story's work on the Constitution (5th ed.), § 1880, is cited on page 634 of the *Gitlow* decision. On this subject that eminent authority, in expounding the First Amendment which declares: "Congress shall make no law abridging the freedom of speech or of the press," wrote as follows: (§ 1880)

"That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private therefor, is a supposition too wild to be indulged by any rational man. . . . A man might, out of mere malice and revenge, accuse another of the most infamous crimes . . . might inflict the most distressing punishments upon the weak, the timid, and the innocent; might prejudice all a man's civil and political, and private rights; and might stir up sedition, rebellion, and treason even against the government itself, in the wantonness of his passions or the corruption of his heart.

Civil society could not go on under such circumstances. Men would then be obliged to resort to private vengeance to make up for the deficiencies of the law; and assassinations and savage cruelties would be perpetrated with all the frequency belonging to barbarous and brutal communities.

"It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person in his rights, person, property, or reputation; and so always that he does not thereby disturb the public peace, or attempt to subvert the government."

"DANGEROUS TENDENCY" IS TEST APPLIED IN DECIDING CONSTITUTIONALITY OF STATUTES PENALIZING CERTAIN LANGUAGE

The *Gitlow case* (page 668) also cites approvingly the case of *State vs. Holm*, 139 Minn. 267, 166 N. W. 181 (2), L. R. A. 1918-C, 304. This decision upholds the constitutionality of a Minnesota statute which made it "unlawful for any person to teach or advocate . . . that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States," against the contention that it was violative of section 1 of the 14th amendment to the federal constitution. On this point the *Holm* case declares: (p. 183 of 166 N. W.)

> "To what extent this amendment takes from the States the power to place legislative restrictions upon the freedom of speech and the freedom of the press is still a mooted question; but, conceding that it protects this right from abridgment by the States, the freedom secured thereby is not an unlimited license to speak and to publish whatever one may choose. It is settled that the State may prohibit publications or teachings which are *injurious to society, or which tend to subvert or imperil the government or to impede or hinder it in the performance of its public and governmental duties* without infringing the constitutional provisions which preserve freedom of speech and of the press."

The standard here adopted is *"dangerous tendency."* If the writings or speech have a "dangerous tendency," viewed from the standpoint of governmental and social safety, then the State has a right to penalize such writings and speech without infringing the constitutional right of freedom of speech and press. This same standard was adopted and applied by the Supreme Court of the United States in the following cases in 1919 and 1920, upholding convictions in federal courts of violating the Espionage Act of 1917

against contentions that the right of freedom of speech and press was unconstitutionally abridged:

Debs vs. U. S., 249 U. S. 211.
Abrams vs. U. S., 250 U. S. 616.
Schaefer vs. U. S., 251 U. S. 466.
Pierce vs. U. S., 252 U. S. 239.

"CLEAR AND PRESENT DANGER OF SUCCESS" NOT REQUIRED UNDER THE SUPREME COURT'S RULINGS

Appellant contends that before a person can be penalized for attempting to incite an insurrection by use of words of incitement, it must be shown that there exists a "clear and present danger of the success" of his plan. And in support of this contention he cites the case of *Schenck vs. United States*, 249 U. S. 47. This was an affirmance of a conviction in a federal court of violating the Espionage Act of 1917, in which the decision said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

But in a later part of the *Schenck* decision (page 52), Justice Holmes said something which we can just as well point to as supporting the "dangerous tendency" rule instead of the "clear and present danger" rule:

> "If the act (speaking, or circulating a paper), *its tendency and the intent with which it is done*, is the same, we perceive no ground for saying that success alone warrants making the act a crime."

And in the four cases which followed the *Schenck* case within the course of a year and a half (*Debs*, *Abrams*, *Schaefer* and *Pierce* cases, supra) the Supreme Court absolutely abandoned all reference to any necessity for "clear and present danger," and affirmed the convictions upon the principle of *"dangerous tendency."*

For instance, in the *Pierce case* (252 U. S. 239, 243), one of the points which went up for decision was the contention that the judge erred in refusing to sustain the demurrer, one of the grounds of which was (3rd) "that there was a failure to show a *clear and present danger* that the distribution of the pamphlet would bring about the evils that Congress sought to prevent by the enactment of the Espionage Act." As to this contention the majority of the Supreme Court held, seven to two (Justices Holmes and Brandeis dissenting):

> "Whether the statements contained in the pamphlet had a *natural tendency* to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer, but by the jury at the trial." (page 244.)

Thus the majority of the court ignored the contention that the state of facts did not present a "clear and present danger" as unnecessary even to answer, or else held (in effect) that these words only meant "a natural tendency to produce the forbidden consequences."

The *Gitlow* decision (on p. 671) actually summarizes the *Schenck* case as holding that in the case of a general statute (penalizing a substantive evil without specifying the words declared to be unlawful), "the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if *its natural tendency and probable effect* were to bring about the substantive evil which the legislative body might prevent," (citing *Schenck & Debs* cases). Thus the Supreme Court treated the *Schenck* case, when considered in the same picture with the subsequent *Debs* case, as applying the *dangerous tendency* rule, which, we have pointed out above, has been applied in so many other cases that it has become the established rule.

Likewise, in *Abrams vs. United States* (250 U. S. 616), in which five Russians were convicted under the Espionage Act for distributing pamphlets appealing to "workers" to oppose and resist the government in its war activities, the Court held

(seven to two) that there was no infringement of the constitutional freedom of speech and press, because (page 624) "the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war" and "the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war."

The basis upon which the *Abrams* case was affirmed was the *intent*, as illustrated in the above quotations, disregarding the question whether the case presented any "clear and present danger" of the defendants' plan succeeding.

While Justices Holmes and Brandeis dissented in the *Abrams* case, the dissenting opinion which was written by Mr. Justice Holmes also indicates a departure from the "clear and present danger" rule. For he says, (page 628):

> "But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil *or an intent to bring it about* that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."

This certainly recognized and admitted that there would not always have to be a "present danger of immediate evil" to warrant a legislative curtailment of freedom of speech and press, but that the *intent* of the inflammatory speaker or writer was sufficient basis for punishing him regardless of whether there was in fact a "present danger" of his succeeding." Mr. Justice Holmes continued as follows in the dissenting opinion in the *Abrams* case: (page 628):

> " . . . Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Pub-

lishing those opinions *for the very purpose of obstructing, however, might indicate a greater danger, and at any rate would have the quality of an attempt.* So I assume that the second leaflet, if published for the purposes alleged in the fourth count, might be punishable."

IN WHITNEY v. CALIF., ENTIRE COURT ACCEPTED DEPARTURE FROM THE "CLEAR AND PRESENT DANGER" RULE

While the cases discussed in the last few pages of this brief (*Debs, Abrams, Schaefer* and *Pierce* cases), were all cases of violating the *Espionage Act,* and therefore involved the principle of resistance to the prosecution of the war, it cannot be said that this fact controlled the trend of the decisions or is responsible for the departure from the "clear and present danger" rule.

The *Gitlow* decision, supra, (268 U. S. 652) was decided in 1925, and the case of *Whitney v. California,* 274 U. S. 357, in 1927. Both of these were State court prosecutions for violations of State criminal syndicalism statutes, in which the appellants contended that the statutes violated the 14th Amendment to the Constitution of the United States by unduly infringing the right of freedom of speech, assembly, etc.

Both the New York and the California statutes in question were upheld by the Supreme Court as constitutional exercise of police power by the States.

While the *Gitlow* case was affirmed by a divided court, seven to two, Justices Holmes and Brandeis dissenting, the *Whitney* case was affirmed without any dissent. Justices Holmes and Brandeis filed a separate opinion concurring in the result, with slightly different argument and reasoning.

The most noticeable thing about the *Whitney* decision, insofar as a present consideration of it is involved, is the fact that both of the opinions rendered in the case (the main opinion and the special concurrence) indicate the acceptance of a departure from or modification of the "clear and present danger" rule of the old *Schenck* case. The main opinion,

filed by Justices Taft, Van Devanter, McReynolds, Butler, Sutherland, Stone and Sanford, declared: (page 371)

> "That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom *by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means,* is not open to question. *Gitlow v. New York,* 268 U. S. 652, 666-668, and cases cited."

(It will be noticed that the test of constitutionality above applied to statutes abridging the freedom of speech is *"dangerous tendency"*—utterances "tending" to "endanger the foundations of organized government," etc.)

And in the special concurring opinion, written by Mr. Justice Brandeis in the *Whitney* case, and concurred in by Mr. Justice Holmes, the following significant language is used: (page 373)

> "... Although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, *or is intended to produce,* a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled. See *Schenck v. U. S.,* 249 U. S. 47, 52."

Thus it was definitely stated in this special concurring opinion that if certain speech is used *with intent to bring about a*

clear and imminent danger to the State (such as, for example, an intent to bring about the State's overthrow by violent means), then the speech may be penalized by the State.

This language is remarkably close to the language of the Georgia Supreme Court in denying the motion for rehearing in Herndon's case, wherein it was said :(179 Ga. 600.)

> "Force must have been contemplated . . . but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce."

In reading the United States Supreme Court decision in the *Whitney* case (274 U. S. 357), and also the California decision which it affirmed (57 Cal. App. 449, 207 P. 698) we see nothing to indicate that there was any evidence of a "clear and present danger" that the defendant and her associates in the Communist Labor Party might succeed in bringing about the revolution which their platform was shown to advocate. The California statute that Miss Whitney was convicted of violating provided that "any person who organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism is guilty of a felony and punishable by imprisonment." (See p. 360 of 274 U. S.)

The evidence against Miss Whitney showed (a) that she joined and participated as a committee officer in a convention held by the Communist Labor party, and (b) that the platform and avowed principles for which the party stood were revolutionary in nature and advocated violence as a means for the proletariat to overthrow the capitalist government. The case, therefore, is quite plainly a parallel to that of Herndon. The Supreme Court's decision in the *Whitney* case (pages 363 to 365 of 174 U. S.) sets forth quotations from the Communist Labor party's platform and literature, showing a remarkable parallel to some of the evidence ad-

duced in the *Herndon* trial. We shall not at this place in our brief discuss the evidence in detail. The point at this time is that the California statute did not limit its application to cases where there was "clear and present danger," nor did the evidence show any "clear and present danger" that the defendant and her associates would succeed in their revolutionary plan. This shortcoming, if it be such, did not prevent the United States Supreme Court affirming the conviction. Therefore the *Whitney* decision is eminent authority for our position that "clear and present danger" is not an essential element of the constitutional test to be applied to State statutes abridging freedom of speech and assembly.

"DANGEROUS TENDENCY" RULE APPLIED BY U. S. SUPREME COURT IN SUSTAINING MINNESOTA STATUTE

Between the time of the *Debs* decision and the *Gitlow* and *Whitney* decisions, there came up for decision the case of *Gilbert v. Minnesota*, 254 U. S. 325. In this case the question was up for consideration as to whether the Minnesota statute making penal "speaking against enlistment" was an unconstitutional infringement upon the right of freedom of speech. The statute being construed was the same one that the Minnesota Supreme Court had already declared constitutional in the case of *State vs. Holm*, 139 Minn. (supra), which as we have pointed out was cited approvingly in the *Gitlow* decision. In this case, likewise, the United States Supreme Court cited approvingly the *Holm* case. (See page 329.) The Supreme Court held that the Minnesota statute did not unlawfully abridge the right of freedom of speech, and *in so doing made no mention whatever of any "clear and present danger" rule.* The decision pointed out and dwelt considerably (pages 332, 333) upon the fact that the evidence indicated that Gilbert's *intent* was the discouragement of enlistment in the army during war time, but the decision pointed out *no "clear and present danger"* that his words

would have any effect of actually obstructing enlistment, but on the other hand seems to have been based upon the fact that the prohibited speech had a "dangerous tendency." This fact is brought out more clearly by inspecting the dissenting opinion of Mr. Justice Brandeis, who expressed the opinion that the statute was unconstitutional because "it abridges freedom of speech and of the press, not in a particular emergency, in order to avert a *clear and present danger*, but under all circumstances. Mr. Justice Holmes did not join in this dissent, but concurred in the result reached by the majority.

HISTORY OF GEORGIA STATUTE SHOWS IT WAS PASSED TO CURB THE SUBSTANTIVE EVIL OF ATTEMPTING TO INCITE PEOPLE TO INSURRECTION. TIME HAS NOT DIMMED OR VARIED THIS EVIL

Appellant's brief, on pages 23 to 39, contains historical citations and argument seeking to point out that the Georgia statute was not aimed at the communist party, and therefore is worthy of no consideration as a legislative finding that conduct and advocacy such as Herndon was engaged in constituted a substantive evil.

While appellant cites historical works to sustain his statement that there were rumors of insurrection among the negroes in Georgia in 1865 and 1866, he cites nothing to show that this was the sole reason for the passing of the insurrection statute in 1866.

As a matter of fact, history shows that there was considerable fear on the part of governmental authorities that the *white people themselves* would break out in renewed civil war, and the Legislature of 1866 was very anxious to be conciliatory to the national government and passed this act as a manifestation of intent to put down any new manifestation of insurrection or the advocacy thereof.

See Vol. I, *Doc. History of Reconstruction* (*Fleming*), page 59, giving extracts from *Report of Joint Committee on*

Reconstruction, 39th Congress, quoting General Grierson as follows:

> "I believe that there is an organization existing now throughout the South for the renewal of the rebellion. Many circumstances or things which have occurred since the surrender make me believe so." (1865)

Appellant cites this congressional committee report and this historical work, on page 35 of his brief. The same historical work, on page 59, quotes the *Carl Schurz report to President Johnson* (1865) as reciting that there were then four classes of people in the South, one class consisting of "the incorrigibles, who still indulge in the swagger which was so customary before and during the war, and still hope for a time when the Southern Confederacy will achieve its independence."

Another well known work, *Reconstruction in Georgia*, by Mildred Thompson, instructor of history at Vassar College (Columbia Univ. Press) on page 163, summarizes the *Carl Schurz Report to President Johnson* as expressing "omens of recurring rebellion and re-enslavement." On page 165, this book points out that "the basis on which Congress acted in enforcing new reconstruction upon the Southern States in 1865 was that they were still in a condition of war." The author then declares that there was in fact no real danger of any new rebellion in Georgia, though there was in some other States.

In this setting then (perhaps combined with appellant's reported rumor of insurrection among the newly liberated slaves) the Georgia Legislature passed the present insurrection statute in 1866.

Coulter's *Short History of Georgia* (cited extensively from page 29 to 37 of appellant's brief) points out, on page 343, that the law which was passed in 1866 providing that "anyone attempting to incite combined resistance through violence against the State should suffer death" was an expression by the State of a willingness to support and maintain the newly constituted authority within the State. Coulter here recites

that by this and other laws passed in 1866 "Georgia felt that she was showing full loyalty to the Union and proper respect to her conquerors, without heaping disgrace upon herself by abandoning the memories of her past heroism."

It is also worthy of note in this connection that Georgia reaffirmed this statute by amending it in December, 1871, specifically making the punishment clause apply to "Attempts to incite insurrection," after the Supreme Court of Georgia had held in *Gibson v. State*, 38 Ga. 571, that the penalty clause was defective. See Acts 1871, page 19.

Thus we see that this statute expresses a legislative finding in 1866 (and reaffirmed in 1871) that attempting to incite people to combined resistance to the lawful authority of the State constituted a sufficient substantive evil to call for an abridgement of freedom of speech in this regard.

It makes no difference whether the Legislature particularly feared an insurrection by white people or an insurrection by negroes. The danger to the State would be just as real, whether the insurrectionists were white or black.

This legislative inquiry and finding made in 1866 and reaffirmed in 1871 is just as true today as it was then. Time has not dimmed its value as a legislative enactment.

There is a remarkable parallel between the recent attempts of the communist party to incite the negroes to seize the land of all white people in the "black belt" and to set up an independent negro nation there, and the attempts which appellant declares in his brief were being made in 1866 to incite the newly liberated slaves to insurrection.

Calling the thing "communism" today doesn't make it any different from the incitements of 1866, if in fact it is similar. A stinkweed by any other name would smell just as bad.

Suppose the Governor of every State had to call his Legislature in special session to pass new laws whenever a new and previously unpenalized weapon or scheme of gangland appeared, instead of utilizing the laws already on the books insofar as the generality of their terms might fit the exigency of the new situation!

We have on the statute books an offense known as "carrying concealed weapons." When this was passed machine-guns were not in existence. Modern invention produced them later. But if a gangster is arrested with a concealed machine-gun and charged with violating that ancient statute against "carrying concealed weapons," it would hardly lie in his mouth to contend that the Legislature had not determined that the carrying of concealed machine-guns was an evil to be prohibited since they had come into existence after the enactment of the statute.

Appellant's attempt to argue around the *Gitlow* decision by his historical recital showing that the present Georgia statute (section 56) was passed in 1866, when the Georgia Legislature could not possibly have had the communists in mind, will avail him naught, for the communists of today have brought themselves under the terms of the Georgia statute of 1866, and the legislative finding that such iniquitous activity was a sufficient menace to society to call for an abridgement of freedom of speech in this respect stands as true today as it did then.

III

THE GEORGIA STATUTE, AS CONSTRUED, IS SUFFICIENTLY DEFINITE AND CERTAIN

Appellant contends that the Georgia statute under which this conviction took place, as construed by the Supreme Court of Georgia, violates the due process clause of the Fourteenth Amendment because of alleged vagueness and uncertainty.

In construing this statute the Georgia Supreme Court held that in order to be guilty of "attempting to incite insurrection" a person must attempt to induce others to join in combined resistance to the lawful authority of the State, and that in so doing *he must intend that force be used.* In further explanation, as to *when* the force must be intended to ensue, the court said:

"Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce."

This is not vague or indefinite. The statute, as stated and construed, definitely informs a person that he must not attempt to incite others to combined resistance by force to the lawful authority of the State when he intends that such force shall come at some time as a direct result of his influence upon those whom he attempts to incite. Thus *intent to bring about force* as a direct result of his incitement is declared to be a necessary element of the offense.

The statute of the State of Washington, considered and held constitutional in *Fox v. Washington*, 236 U. S. 273, was analogous in many respects to the statute now up for consideration, though the evil there dealt with and penalized did not involve "forceful resistance to the lawful authority of the state" but only "disobedience of law" and "disrespect for law." The Washington statute provided:

> "Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or *inciting*, or having a *tendency* to encourage or incite the commission of any crime, breach of the peace, or act of violence, or which shall *tend to encourage or advocate disrespect for law* or for any court or courts of justice, shall be guilty of a gross misdemeanor."

This statute was attacked, *by demurrer*, as being unconstitutional, and upon conviction Fox appealed to the Supreme Court of Washington, where it was held that the statute was

not violative of the Fourteenth Amendment, that it did not unlawfully abridge freedom of speech, and that it was not bad for uncertainty. (See page 276 of 236 U. S.). The decision of the United States Supreme Court, written by Mr. Justice Holmes, intimates that the statute would have been unconstitutional if it had been construed "to prevent publications merely because they tend to produce unfavorable *opinions* of a particular statute or of law in general," but (quoting Mr. Justice Holmes):

> "We understand the state court by implication, at least, to have read the statute as confined to encouraging an actual breach of law. Therefore the argument that this act is both an unjustifiable restriction of liberty and *too vague* for a criminal law must fail."

The headnote summarizes the decision as follows:

> "A statute which . . . makes criminal the editing of printed matter tending to encourage and advocate disrespect for law, cannot be said to violate U. S. Const., 14th Amend., as being an unjustifiable restriction of liberty, and too indefinite for a criminal statute, where the highest state court, by implication at least, reads the statute as confined to encouraging an actual breach of the law, and in the case at bar has merely construed it as embracing an article encouraging and inciting a persistence in what would be a breach of the state laws against indecent exposure."

(It will be noted that this decision is relevant also to the preceding division of this brief. There is no mention of any "clear and present danger" that the incitement would be acted upon by the persons encouraged by the article. The decision upheld the statute because it penalized the publishing of articles *encouraging people to commit actual violations of law.* And the law violations involved were not matters that contained any danger of overthrow of the government or forceful resistance to it.)

The decision of the *Fox* case in the Washington supreme

court (71 Wash. 185), cited only one case on the question of alleged vagueness of the statute, to-wit: *Waters-Pierce Oil Co. v. Texas,* 212 U. S. 86, which held:

> "6. Due process of law is not denied a corporation convicted of violating the Texas anti-trust laws of May 25, 1899, and Mar. 31, 1903, because the legislation permits and the trial court charged that there may be a conviction not only for acts which accomplish the prohibited result, but also for those which *'tend'* or are *'reasonably calculated'* to bring about such result."

In *Nash vs. United States,* 229 U. S. 373, which is cited in *Fox v. Washington,* supra, (236 U. S. on page 277), it was held that "there is no such vagueness in the anti-trust act of July 2, 1890, as to render it inoperative on its criminal side, because only such contracts and combinations are within the act as, by reason of intent, or of the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition, or unduly obstructing the course of trade."

GEORGIA STATUTE MORE DEFINITE THAN THE CALIFORNIA STATUTE WHICH WAS UPHELD

The Georgia statute now being considered is more definite and certain than was the California statute under which Miss Whitney was convicted, and which was sustained in *Whitney v. California,* 274 U. S. 357, 368, against the contention that it was "repugnant to the due process clause by reason of vagueness and uncertainty of definition." The decision recites that she was convicted under Sec. 2, subd. 4, which was as follows:

> "Any person who . . . (4) organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism, is guilty of a felony."

And criminal syndicalism was defined in the act as:

> "Any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."

Let this be compared, as to definiteness, with the Georgia statute providing, as construed, that *any person is guilty of a felony who attempts to induce others to join in combined resistance by force to the lawful authority of the State, provided he intends that such force shall come at some time as a direct result of his influence upon those whom he attempts to incite.*

In discussing the contention that the California statute was unconstitutional by reason of vagueness and uncertainty, the decision in the *Whitney* case says that the criminal syndicalism statute "has no substantial resemblance to the statutes held void for uncertainty under the 14th and 5th Amendments in *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221, and *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 89, because not fixing an ascertainable standard of guilt."

Appellant, on pages 42 and 43 of his brief, quotes at length from the *L. Cohen Grocery Company* and the *International Harvester* cases, above referred to. We feel that the language of the *Whitney* decision is sufficient answer to their citation in the present appeal.

The *Whitney* decision points out that similar criminal syndicalism statutes of other states, some less specific in their definitions than the California statute under consideration, have been held by the state courts not to be void for indefiniteness, the following examples being cited:

State v. Hennessy, 114 Wash. 351, 364.

State v. Laundy, 103 Or. 443, 460.

Peo. v. Ruthenberg, 229 Mich. 315, 325.
Fox v. Washington, 236 U. S. 273, 277.
Peo. v. Steelik, 187 Cal. 361, 372.
Peo. v. Lloyd, 304 Ill. 23, 34.

IV.

THE GEORGIA STATUTE, AS APPLIED IN THIS CASE, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The evidence in this case established the fact that Herndon had come to Atlanta from another state as a paid organizer for the communist party, and that he had no other business or interest in view in coming to Atlanta. The evidence did not show the exact time of his arrival, but it appeared that under a different name he had rented a postoffice box for the reception of mail in Atlanta in September, 1931. He was arrested and indicted in July, 1932. It appeared that during that period of time he had been working up an organization for the party in Atlanta, had actually obtained some members, and had called and conducted some meetings in the interest of furthering the organization. His admissions to the officers covered this much, and the nine membership books (filled out with the names and data of members), (R. 92 et seq) together with the record of various "minutes" of meetings found in the documents under his arm (R., 117, 118, 119) also showed this.

The evidence showed that he had seized upon a condition of employment and unrest in Atlanta to call forth and produce a mass demonstration of unemployed people, white and colored, demanding increased appropriations for "relief" from county authorities. (See documents No. 30 and No. 31, R., 123-125, also his admissions to witness E. A. Stephens concerning them, R., 62-63). He had had 7,500 of the circulars printed at communist division headquarters at Chattanooga, and distributed them in Atlanta. (R., 62-63). These circu-

lars did not advocate force or violence. In them Herndon posed as "the Unemployed Committee of Atlanta, P. O. Box 339" (Herndon's box.)

The jury was authorized to find, from the circumstantial evidence as a whole, that Herndon's distribution of above circulars and his inspiring of the mass demand, was not being done through any interest in helping such unemployed persons but merely as a means to an end, to-wit: furthering the organization of the communist party which he was paid to organize. Evidence authorizing the jury to reach this conclusion consisted of (a) the proof that the purpose of his coming to Atlanta was not to take part in any local enterprise or business but to work up an organization for the communist party, for which he was being paid; (b) the minutes of the meetings he had held; (c) Document No. 29, a copy of the Daily Worker, issue of July 8, 1932, the central organ of the communist party of the U. S. A. (R. 122A) with an article on page 6 of said newspaper (R. 122-B) entitled "Everything is Peaches Down in Georgia," that plainly showed that the activities of Herndon in inspiring the mass demonstration by means of his circulars under the nom-de-plume of "unemployment committee" was a mere communist activity to focus public discontent into mass action; and (d) the contents of the other documents found in the box under Herndon's arm when he was arrested showing that the stirring up of such mass demonstrations was part of the regular orders of the communist party to its organizers. (See, for example, R., 108, middle of page.)

The above mentioned circulars are not the basis of the case against Herndon. They are, however, a part of the evidence, to be considered along with the whole of the evidence, in arriving at the real purpose and plan of Herndon to incite an insurrection. The jury were authorized to find that his chief objective was to press the cause of the communist party, and that his agitations with reference to local conditions were not the result of any particular interest in local welfare but were pursued merely as a method of fomenting a state of discontent and unrest as a goodly premise for his party pro-

gram. The jury, on seeing that his principal mission was to spread the doctrine of the communist party, could weigh the other circumstances in the light of this fact. In view of it, the documents found in his possession assumed an added significance, and the use to which the defendant applied them became an easier question for solution by the jury. Were not these documents and membership books the tools to be used by the defendant in the execution of his mission? Did he remain in Atlanta for about a year as a paid organizer for the Communist party without using them? He told the officers that he was sent to Atlanta as a paid organizer for the communist party, and that the literature was sent to him from the headquarters of this party in New York City. See testimony of Officer Watson (R. 57).

HIS DUTIES AS ORGANIZER OUTLINED

Shortly after his arrest he was taken before Mr. E. A. Stephens, assistant solicitor general, who testified as follows: (R. 61-62) "He stated that he came from Lexington, Kentucky, where he was an employee of some coal mine company, he stated that a man by the name of E. Doran came there and got him interested in the Communist Party, and that he joined the Nation Communist Party at Lexington, Kentucky, . . . he stated that he was sent to Atlanta to take the position of Organizer for the Communist Party; . . . he stated he was paid $10 a week, sometimes in cash and sometimes in money orders. At that time he stated to me that his duties were, as organizer for the Communist Party, to call meetings, educate or disseminate information regarding the party at these meetings, to distribute literature, to secure members for the organization and generally to work up an organization of the Communist Party in Atlanta. . . . He said he had held or attended two meetings, and then later when questioned about where they were held he designated the meeting places of three meetings that he had called and had been held . . . he did give me the names of persons that he said were members of the organization, said he only have (had) five or six actual

members at that time—actual members, as he put it—said the meetings were sometimes in vacant houses and sometimes in private houses . . . he made these statements to me freely and voluntarily. I want to state further, among the other things he said in talking to me about the quantity of literature here in the suitcase and in the grip, a part of which you will notice has been taken out of the wrapper—there are several packages like this—in questioning him what this was sent to him for, he stated for distribution at his meetings, the same with reference to many of the books that he had in these two receptacles there . . . he said that he called the meetings; and held them and conducted the meetings; as to whether he said he made any speeches at any of these meetings, I don't know that the word 'speech' was used."

Other evidence was introduced which showed that the defendant had induced others to become members of the Communistic Party, about twelve in all. What purported to be minutes of three meetings were also found in the defendant's possession. Some of the minutes made reference to "section committees," and from the evidence as a whole the jury were authorized to find that the phrase "section committee," like the term "unemployed committee," was a designation applied to a subordinate division of the Communist Party. In his statement to the jury he denied none of the testimony to which reference has been made, and made no explanation or statement whatsoever with regard to the literature.

ALL MEMBERS MUST FOLLOW INSTRUCTIONS FROM INTERNATIONAL HEADQUARTERS

Among the documents, found in a box under Herndon's arm at the time of his arrest (R., 92), were nine "Membership Books . . . of the Communist Party of the U. S. A.," containing the names of persons "admitted" to the party in Atlanta. These books also contained what purported to be "extracts from the Statutes of the Communist Party of the U. S. A.," some of which were as follows: "A member of the Party can be every person from the age of eighteen up

who accepts the program and statutes of the Communist International and the Communist Party of the U. S. A., who becomes a member of a basic organization of the Party, who is active in this organization, who subordinates himself to all decisions of the comintern and of the party, and regularly pays his membership dues. . . . The Communist Party, like all sections of the comintern, is built upon the principle of democratic centralization. These principles are: . . . Regular reporting of the party committees to their constituents. *Acceptance and carrying out of the decisions of the higher party committees* by the lower, strict party discipline, and immediate and exact applications of the decisions of the executive committee of the Communist International and of the Central Committee of the Party. . . . The basis of the party organization is in the nucleus (in factories, mines, shops, etc.) which all party members working in these places must join. The nucleus consists of at least three members. Newly organized nuclei must be endorsed by the leading committee of the Section in which the shop nuclei are organized. . . . The strictest party discipline is the most solemn duty of all party members and all party organizations. The decisions of the CI and the party convention of the CC and of all leading committees of the party must be promptly carried out. Discussion of question over which there has been differences must not continue after the decision has been made."

In the same membership books we find the following question and answer: "What is the Communist Party? The party is the vanguard of the working class and consists of the best, most class conscious, most active, the most courageous members of that class. It incorporates the whole body of experience of the proletarian struggle, basing itself upon the *revolutionary theory of Marxism* and representing the general and lasting interests of the whole of the working class. The party personifies the unity of proletarian principles, of proletarian will and of proletarian revolutionary action. (From the program of the Communist International). We are the party of the working class. Consequently, nearly the whole of that class (in time of war and civil war, the whole of that class)

should work under the guidance of our party, should create the closest contacts with our party. (Lenin). He who weakens no matter how little the iron discipline of the party of the proletariat (especially during the period of dictatorship), effectually helps the bourgeoise against the proletariat (Lenin.)"

The authenticity of the literature was effectually admitted by the defendant, and thus no reasonable question can be raised in this case as to the reality of its apparent source, whether it purports to be an expression from the New York headquarters or from the main party organization, wherever located. The defendant himself was admittedly a member of the party, and he showed that he was connected with a "party Committee."

PLAN OF THE COMMUNIST PARTY IN THE "BLACK BELT"

One of the documents was a booklet entitled *"The Communist Position on Negro Question."* (R., 102-111). On the outside cover was a map of the United States, under which was the following: *"Self Determination for the Black Belt."* The map had a dark belt across it, beginning with a portion of Arkansas and Louisiana, and extending generally eastward through the States of Mississippi, Alabama, Florida, and Georgia, and thence up the coast through several States. The belt included about two-thirds of the State of Georgia. On page 28 of the pamphlet appeared the following: "In the South, the fight must be fearlessly developed against the thievery and robbery of the Southern capitalists and landlords; against their whole system of enslaving the Negroes based on Jim-Crowism and lynch terror. We must fight there not merely against inequality, but against the whole system by which this inequality is enforced. In the first place, our demand is that the land of the Southern white landlords, for years tilled by the Negro tenant farmers, be *confiscated and turned over to the Negroes.* This is the only way to insure economic and social equality for the tenant farmers. Sec-

ondly, we propose to *break up the present artificial state boundaries* established for the convenience of the white master class, and to establish the state unity of the territory known as the *'Black Belt,'* where the Negroes constitute the overwhelming majority of the population. Thirdly in this territory, we demand that the Negroes be given the complete right of self-determination; *The right to set up their own government* in this territory and the right to *separate,* if they wish, from the United States. Around these demands for the Negroes, as I have outlined them here with the *revolutionary* white workers in the very fore-front of the struggle—the unity of white workers, small farmers and the negro masses must be established.. *Not promises: but action.*"

The matter last quoted appeared to be an extract from a speech nominating a candidate for vice-president of the United States on the communist ticket for 1932; but it appeared in a pamphlet entitled "The Communist Position on the Negro Question," and came to the defendant with the express approval of the party headquarters in New York, as shown by the foreword on the first page of the booklet (see R., 104), reciting:

> "The documents presented in this pamphlet are the result of the very best and most careful thought, study and experience of our Party. The correct line of our Party on this question has been hammered out in years of bitter struggle—struggle with the enemies of Bolshevism. . . . But in the furious struggle against our enemies . . . our Party has hammered out its Bolshevik line on the negro question."

Referring to this and the other communist literature introduced in evidence Officer Watson testified: (R. 57.)

> "He told us they were sent to him from headquarters of this Communist Party in New York."

The nominating speech quoted as above is especially relevant as an explanation of what was meant by the slogan: *"Self Determination for the Black Belt"* which was shown to

be carried in the title lines of the "Daily Worker," the daily newspaper of the communist party (R. 122A); on the back of their campaign-fund subscription certificates (R. 100A); and in various other places in the literature. It also showed, together with the above widely-used slogan, that the Communist Party of the U. S. A. was *obeying* or *following* the instructions of the international headquarters of the communist party (in Russia), which we will now quote:

TEXT OF THE COMMUNIST INTERNATIONAL ORDERS TO THE AMERICAN COMMUNIST PARTY

This pamphlet which carried the map of the *"Black Belt,"* also contained the following: (R., 104-109) *"Resolutions of the Communist International on the Negro Question in the United States.* 1 . . . The struggle of the Communists for the *Equal Rights* of the Negroes applies to all Negroes, in the North as well as in the South. The struggle for this slogan embraces all or almost all of the important special interests of the Negroes in the North, but not in the South, where the main Communist slogan must be: *The Right of Self-Determination of the Negroes in the Black Belt.* These two slogans, however, are most closely connected. The Negroes in the North are very much interested in winning the right of self-determination of the Negro population of the Black Belt and can thereby hope for strong support for the establishment of true equality of the Negroes in the North. In the South the Negroes are suffering no less, but still more than in the North from the glaring lack of all equality; for the most part the struggle for their most urgent partial demands in the Black Belt is nothing more than the struggle for their equal rights, and only the fulfillment of their main slogan, the right of self-determinaton in the Black Belt, can assure them of true equality. . . . It is the special duty of the *revolutionary Negro Workers* to carry on tireless activity among the Negro working masses to free them of their distrust of the white proletariat and draw them into the common front of the *revolutionary class struggle* against the bour-

geoisie. The slogan of the right of self-determination occupies the central place in the liberation struggle of the Negro population in the Black Belt against the yoke of American imperialism. But this slogan, as we see it, must be carried out only in connection with other basic demands. Thus, there are three basic demands to be kept in mind in the Black Belt, namely, the following: (a) *confiscation of the landed property of the white landowners and capitalists for the benefit of the Negro farmers.* The landed property in the hands of the white American exploiters constitutes the most important material basis of the entire system of national oppression and serfdom of the Negroes in the Black Belt. More than three-quarters of all Negro farmers here are bound in actual serfdom to the farms and plantations of the white exploiters by the feudal system of 'share cropping.' Only on paper and not in practice are they freed from the yoke of their former slavery. The same holds completely true for the great mass of black contract laborers. Here the contract is only the capitalist expression of the chains of the old slavery, which even today are not infrequently applied in their natural iron form on the roads of the Black Belt (chain gang work). These are the main forms of present Negro slavery in the Black Belt, and no breaking of the chains of this slavery is possible without *confiscating* all the landed property of the white masters. Without this *revolutionary measure,* without the *agrarian revolution,* the right of self-determination of the Negro population would be only a Utopia or, at best, would remain only on paper without changing in any way the actual enslavement. (b) *Establishment of the State unity of the Black Belt.* At the present time this Negro Zone—precisely for the purpose of facilitating national oppression—is artificially split up and divided into a number of various states which include distant localities having a majority of white population. If the right of self-determination of the Negroes is to be put into force, it is necessary wherever possible to bring together into one government unit all districts of the South where the majority of the settled population consists of Negroes. Within the limits of this State there will of

course remain a fairly significant white minority which must submit to the right of self-determination of the Negro majority. There is no other possible way of carrying out in a democratic manner the right of self-determination of the Negroes. Every plan regarding the establishment of the Negro state with an exclusively Negro population in America (and of course still more exporting it to Africa) is nothing but an unreal and reactionary caricature of the fulfillment of the right of self-determination of the Negroes, and every attempt to isolate and transport the Negroes would have the most damaging effect on their interests. Above all, it would violate the right of the Negro farmers in the Black Belt not only to their present residences and their land, but also to the land owned by the white landlords and cultivated by Negro labor. (c) *Right of self-determination.* This means complete and unlimited right of the Negro majority to exercise governmental authority in the entire territory of the Black Belt, as well as to decide upon the relations between their territory and other nations, particularly the United States. It would not be right of self-determination in our sense of the word if the Negroes in the Black Belt had the right of self-determination only in cases which concerned *exclusively* the Negroes and did not affect the whites, because the most important cases arising here are bound to affect the whites as well as the Negroes. First of all, true right to self-determination means that the Negro majority and not the white minority in the entire territory of the administratively united Black Belt exercises the right of administrating governmental, legislative, and judicial authority. At the present time all this power is concentrated in the hands of the white bourgeoisie and landlords. It is they who appoint all officials, it is they who dispose of public property, it is they who determine the taxes, it is they who govern and make the laws. Therefore, the *overthrow of this class rule* in the Black Belt is unconditionally necessary in the struggle for the Negroes' rights to self-determination. This, however, means at the same time the *overthrow of the yoke of American imperialism* in the Black Belt on which the forces of the local white bour-

geoisie depend. Only in this way, only if the Negro population of the Black Belt wins its freedom from American imperialism even to the point of deciding *itself* the relations between its country and other governments, especially the United States, will it win real and complete self-determination. One should *demand* from the beginning that *no armed forces of American imperialism should remain on the territory of the Black Belt.* . . . As stated in the letter of the Political Secretariat of the E. C. C. I. of March 16, 1930, the Communists must unreservedly carry on the struggle for the self-determination of the Negro population in the Black Belt in accordance with what has been set forth above. It is incorrect to say that the Communists are only to carry on propaganda or agitation for the right of self-determination, but not to develop any activity to bring this about. No, it is of the utmost importance for the Communist party to reject any such limitation of its struggle for this slogan. Even if the situation does not yet warrant the raising of the question of uprising, *one should not limit oneself at present to propaganda for the 'Right of Self-Determination,' but should organize mass actions, such as demonstrations, strikes, tax boycott movements, etc.* . . . It would be a mistake to imagine that the right of self-determination slogan is a truly *revolutionary* slogan only in connection with the demand for complete separation. The question of power is decided not only through the demand of separation, but just as much through the demand of the *right* to decide the separation question and self-determination in general. A direct question of power is also the demand of confiscation of the land of the white exploiters in the South, as well as the demand of the Negroes that the entire Black Belt be amalgamated into a State unit. Hereby, every single fundamental demand of the liberation struggle of the Negroes in the Black Belt is such that if once thoroughly understood by the Negro masses and adopted as their slogan it will lead them into *the struggle for the overthrow of the power of the ruling bourgeoisie, which is impossible without such revolutionary struggle.* One can not deny that it is just possible for the Negro population of the Black Belt to win the right to self-

determination during capitalism; but it is perfectly clear and indubitable that this is possible only through successful *revolutionary struggle* for power against the American bourgeoisie, through *wresting* the Negroes' fight of self-determination from American Imperialism. Thus, the slogan of right to self-determination is a real slogan of *National Rebellion* which to be considered as such need not be supplemented by proclaiming struggle for the complete separation of the Negro zone, at least not at present. . . . It is particularly incumbent on Negro Communists to criticize consistently the half-heartedness and hesitations of the petty-bourgeois national-revolutionary Negro leaders in the liberation struggle of the Black Belt, exposing them before the masses. . . . Simultaneously, Negro Communists must carry on among the Negro masses an energetic struggle against nationalist moods directed indiscriminately against all whites, workers as well as capitalists, Communists as well as imperialists. Their constant call to the Negro masses must be: *Revolutionary struggle against the ruling white bourgeoisie, through a fighting alliance with the revolutionary white proletariat.*"

ADVOCATED SMASHING THE NATIONAL GUARD, THE C. M. T. C. AND R. O. T. C.

The evidence also included a document entitled "*An Appeal to Southern Young Workers.*" (R., 112-113.) Following are some of the statements contained in this document: "The Young Communist League is the champion not only of the young white workers but especially of the doubly-oppressed Negro young workers. The Young Communist League fights against the whole system of race discrimination and stands for full racial, political, economic and social equality for all workers. . . . The Young Communist League is a section of the Young Communist International, the revolutionary leader of the young workers the world over and accepts the guidance of the Communist party of America. The Young Communist League fights for: . . . *Full political, social and racial*

equality for the negro worker. . . . Smash the National Guard, the C. M. T. C. and R. O. T. C."

Still another document was one entitled *"Party Organizer,"* and containing a number of articles on the Communistic party, on what it advocates, and particularly on the manner of organizing workers. (R., 113.)

In his statement to the jury the defendant said in part (R., 78): "We know the system we are living under is on the verge of collapse; no matter what system we are living under, it has developed to its highest point and comes back . . . for instance, you can take a balloon and get so much air in it, and when you get too much it bursts; so with the system we are living under . . . of course, I don't know whether that is insurrection or not, but the question, it has developed to its highest point."

The defendant here apparently expressed the view that a crisis was impending. Did this statement not indicate a belief that the conditions were opportune for a revolution or insurrection, and that now or soon, would be a seasonable time to strike? We repeat that the case does not turn alone upon the direct evidence that circulars advocating unemployment relief were distributed. It must not be overlooked that the defendant was an organizer and induced a number of persons to become members of the Communist party, the purpose and intent of which are thoroughly illustrated by the documentary evidence from which we have quoted. The establishment of the "Black Belt" by peaceful and thorough lawful processes could not have been reasonably anticipated. It called for "breaking up State lines" with even the right of secession from the present national government. The literature fairly teems with such expressions as "confiscation," "revolution," "rebellion," and "violence," even distinguishing a "reformation" and advocating an "uprooting" in its stead. The jury were amply authorized to infer that violence was intended, and that the defendant did attempt to induce others to combine in such resistance to the lawful authority of the state.

HERNDON WAS AIDING THE COMMUNIST PARTY IN ITS UNLAWFUL ATTEMPT TO INCITE INSURRECTION.

This case against Herndon was based not solely upon any particular speech, writing or advocacy by Herndon himself, but upon the fact that he was proven to be aiding and abetting the Communist party in its unlawful attempt to incite insurrection—Herndon being actively engaged as an organizer for the party and having conducted meetings and solicited and obtained members for it.

The evidence makes out a case against the Communist party as principal in the first degree and against Herndon as principal in the second degree. The principal in the first degree is he who fires the shot (in murder, for example), while the principal in the second degree may fire no shot but is present aiding and abetting in the crime.

The Communist party was shown by its authentic literature to be engaged in active attempt to incite revolution among the negroes of the black belt, attempting to incite them to seize all land in the black belt belonging to white people, to abolish present state borders and to set up a new negro state or republic (or soviet) out of parts of Georgia and other states.

Beginning with page 52 of his brief, appellant argues that the words "revolution," "rebellion," "smash," and numerous other violent expressions contained in the Communist documents found on Herndon's person *might* be so construed as to mean a peaceful or bloodless revolution, etc., and that the announced plan of the Communist party as to setting up a negro state or nation in the "black belt" *might* be accomplished by peaceable means, *i. e.*, that the white people and the states involved *might* give up their land to the negroes peacefully and in that event the aims of the Communist party in this regard would be accomplished without force. On page 53 he even argues that "secession" of the black belt from the rest of the United States "might be accomplished peacefully." And concerning all of the "revolutionary" statements contained in the Communist literature he says: "Considered in

their setting, it is quite clear that the remarks quoted in the statement did not constitute advocacy of the use of violence against lawful authority."

For light upon the question thus raised as to the construction that should be placed upon the statements in the Communist literature found under Herndon's arm, let us turn to well-known and authentic public documents and historical data. In appellant's brief he cites several score of non-judicial citations, including newspapers, histories, legislative reports, semi-official reports, etc. We shall therefore cite the following to show that the "peaceable construction" (suggested in appellant's brief) is not the proper construction of the language used, but that the Communist party stands for *force and violence* and is actively engaged in *attempting to incite a revolution*:

FISH COMMITTEE REPORT IN 1931 UNBARED THE COMMUNIST ATTEMPTS TO INCITE REVOLUTION

House of Representatives Report No. 2290, 71st Congress, known as the *Fish Committee report,* contains ample data showing positively what the Communist party is trying to do. The report summarizes the situation as follows, on page 15:

> "The Communist party only uses the election laws to place its candidates on the ballot, in order to conduct open campaigns for their revolutionary principles. It advocates the overthrow of the Government by direct means, through *force and violence,* and despises the evolutionary method of democratic governments. It seeks to destroy our republican form of government, guaranteed by the Constitution, and to set up a dictatorship of the proletariat."

The Report quotes the acceptance speech of W. Z. Foster, Communist candidate for president of the United States, in 1928, as follows:

> "Our party, different from the Socialist party, creates no illusions amongst the workers that they can vote their

way to emancipation, that they can capture the ready-made machinery of the State and utilize it for the emancipation of the working class. On the contrary, we must utilize this campaign to carry on widespread and energetic propaganda to teach the workers that the capitalist class would never allow the working class peacefully to take control of the state. That is their strong right arm and they will fight violently to the end to retain it. The working class must *shatter* the capitalist state. It must build a new state, a new government, a workers' and farmers' government, *the soviet government of the United States.* . . ."

The Report quotes the following (on page 15) from the published program of the Communist party at its 6th world congress at Moscow in 1929:

"The Communists consider it unworthy to dissimulate their opinions or their plans. They proclaim openly that their designs can only be realized *by the violent overthrow of the entire traditional social order.*"

In accordance with this "openness" about the Communist plans, "Candidate W. Z. Foster" came before the Fish Committee and boldly made the following admissions, as set forth on page 11 of the Report:

"The Chairman: Do the Communists in this country advocate world revolution?

"Mr. Foster: Yes; the Communists in this country realize that America is connected up with the whole world system, and the capitalist system displays the same characteristics everywhere . . . everywhere it makes for the misery and exploitation of the workers . . . and it must be abolished, not only on an American scale but on a world scale.

"The Chairman: So that they do advocate world revolution; and do they advocate revolution in this country?

"Mr. Foster: I have stated that the Communists advocate the abolition of the capitalist system in this

country and every other country; that this must develop out of the *sharpening of the class struggle* and the struggle of the workers for bread and butter."

* * *

"*The Chairman:* They are opposed to our republican form of government?

"*Mr. Foster:* Most assuredly.

"*The Chairman:* And they desire to overthrow it through revolutionary methods?

"*Mr. Foster:* I would like to read from the program of the Communist International at this point. . . . 'The conquest of power by the proletariat *does not mean peaceful capturing of ready-made bourgeois state machinery by means of a parliamentary majority.* The bourgeoisie resorts to every means of violence and terror to safeguard and strengthen its predatory property and political domination. Like the feudal nobility of the past, the bourgeoisie can not abandon its historical position to the new class without a desperate and frantic struggle; hence the violence of the bourgeoisie can only be suppressed by *the stern violence of the proletariat.*'"

The above interesting colloquy continues to the point where Mr. Foster admits that the Communists "owe no allegiance" to the flag of the United States, for the reason that they term it a "capitalist flag." He also admits that the Communists of America "look upon the Soviet Union as their country." On page 9 the Fish Report says:

> "The Communists of the United States openly admit their allegiance to the Communist International at Moscow, and glory in the fact that they obey all the orders issued from there immediately and implicitly."

COMMUNISTS' ADVOCACY OF FORCE AND VIOLENCE LONG ADMITTED

The Report points out on page 5 that the *Communist Manifesto*, by Karl Marx, originally written in 1848 and reaffirmed by the Communist party from time to time since, contains the following:

> "Communists scorn to hide their views and aims. They openly declare that their purpose can only be achieved by the *forcible overthrow* of the whole extant social order. Let the ruling classes tremble at the prospect of a *Communist revolution.*"

And the Fish Report quotes on page 65 the following from a 500-page *Report to the Senate,* by Hon. Charles Evans Hughes, in his capacity as Secretary of State, on Jan. 21, 1924:

> "It will be seen that the question of whether the Communist programs contemplate the use of force and violence has been passed upon by every class of tribunal which could pass upon it, namely, Federal and State courts, administrative tribunals and legislative committees of both Federal and State governments, and in every class the result has been in support of the position that *force and violence are inseparable from Communist programs.*"

We have not at hand a copy of the above *Report to the U. S. Senate,* but we respectfully suggest that this Court call for a copy, particularly to procure the list (referred to above) of decisions of "Federal and State courts, administrative tribunals and legislative committees," establishing that "force and violence are inseparable from Communist programs." We presume that some of the court cases referred to are along the following lines:

In People v. Taylor, 187 Cal. 378, 203 P. 85 (1921), the defendant was convicted under two counts of an indictment charging violation of the criminal syndicalism act, and the first count (under which the conviction was affirmed by the California supreme court) charged that the defendant did "knowingly belong to an organization advocating sabotage," etc. The organization involved was the Communist Labor party, and the finding was therefore that this party advocated sabotage.

A similar finding was made in *People v. Whitney,* 57 Cal. App. 449, 207 P. 698 (1922), which is the case that was

carried to the United States Supreme Court and affirmed in *Whitney v. California*, 274 U. S. 357.

In *People v. Lloyd*, 304 Ill. 23, 136 N. E. 505 (1922), it was held that the evidence sufficiently established that the Communist Labor party advocated overthrow of the government by "force, violence and bloodshed." It was pointed out that the Communist Labor party "stood by the principles of the Communist International formed at Moscow." See particularly headnotes 34, 35 and 60.

In *Com. v. Lazar*, 103 Pa. Super. 417, 157 A. 701 (1931), it was held that "Evidence supported conviction for sedition on ground that language used by defendant advocated *revolution by Communists* as minority party."

In *State v. Boloff*, ... Ore. ..... 4 P. 2nd, 326 (12), (1931), it was held that "the proof with much cogency indicates that the Communist party (of the U. S. A.) *taught and advocated the use of violence, crime and sabotage* on proper instrumentalities in the winning of industrial and political ends." This decision gives extracts of the same Communist membership books that were introduced in the Herndon trial, as well as other Communist pronouncements and manifestoes.

In Lenin's Complete Works, Vol. Xviii, Page 361, the following definition of "dictatorship of the proletariat" is given:

> "The dictatorship of the proletariat is nothing else than power based upon force and limited by nothing . . . by no kind of law and absolutely no rule."

CASE OF FISKE v. KANSAS DID NOT CONTAIN EVIDENCE THAT I. W. W. ADVOCATED FORCE AND VIOLENCE

Appellant cites the case of *Fiske v. Kansas*, 274 U. S. 380, where it was held that the Kansas criminal syndicalism statute as applied violated the due process clause of the Fourteenth Amendment. But the gist of that decision was that the evidence did not show that the I. W. W. advocated force or vio-

lence as a means of accomplishing its announced political and industrial aims. See the following, pages 386-387:

> ". . . And it is not as if the preamble were shown to have been followed by further statements or declarations indicating that it was intended to mean, and to be understood as advocating, that the ends outlined therein would be accomplished or brought about by violence or other related unlawful acts or methods."

The present case is plainly distinguishable because the documents and declarations of the Communist party, for which Herndon was proven to be an organizer, teemed with proof that the party advocated force and violence as a means of accomplishing its aims.

Appellant also cites *Stromberg v. California*, 283 U. S. 359. But this case was reversed because the California statute authorized conviction for displaying a red flag or banner "as a sign, symbol or emblem of opposition to organized government," and the Supreme Court held that this clause was capable of being construed to include the "peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high-minded and patriotic, which did not agree with the one in power" (page 369). And "it might also be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations." It was therefore held that this clause was "repugnant to the guaranty of liberty contained in the Fourteenth Amendment."

In the present case, the Georgia statute is subject to no such criticism as above, and neither has it been applied to any conduct which was "peaceful and orderly opposition to government by legal means and within constitutional limitations."

CONCLUSION

Since Herndon was actively engaged as an organizer in furthering the cause of the Communist party, which was shown to be engaged in attempting to incite an insurrection

and openly advocating force and violence as a means of accomplishing its ends, there was no violation of the constitutional rights under the Fourteenth Amendment in applying to the defendant's case the Georgia statute, nor is the statute unconstitutional.

However, in this appeal, the question of alleged unconstitutionality has not been seasonably presented in the state courts, nor decided there, and the appeal should therefore be dismissed.

Respectfully submitted,

M. J. YEOMANS, *Attorney General of Georgia.*
JOHN A. BOYKIN, *Solicitor General.*
B. D. MURPHY, *Asst. Attorney General.*
JOHN H. HUDSON, *Asst. Solicitor General.*
J. WALTER LECRAW, *Asst. Solicitor General.*

Atlanta, Georgia,
April 2, 1935.

13

SUPREME COURT OF THE UNITED STATES.

No. 665.—October Term, 1934.

Angelo Herndon, Appellant, *vs.* The State of Georgia.	Appeal from the Supreme Court of the State of Georgia.

[May 20, 1935.]

Mr. Justice Sutherland delivered the opinion of the Court.

Appellant was sentenced to a term of imprisonment upon conviction by a jury in a Georgia court of first instance of an attempt to incite insurrection by endeavoring to induce others to join in combined resistance to the authority of the state to be accomplished by acts of violence, in violation of § 56 of the Penal Code of Georgia.[1] The supreme court of the state affirmed the judgment. 178 Ga. 832; rehearing denied, 179 Ga. 597. On this appeal, the statute is assailed as contravening the due process clause of the Fourteenth Amendment in certain designated particulars. We find it unnecessary to review the points made, since this court is without jurisdiction for the reason that no federal question was seasonably raised in the court below or passed upon by that court.

It is true that there was a preliminary attack upon the indictment in the trial court on the ground, among others, that the statute was in violation "of the Constitution of the United States", and that this contention was overruled. But, in addition to the insufficiency of the specification,[2] the adverse action of the trial court was not preserved by exceptions *pendente lite* or assigned as error in due time in the bill of exceptions, as the settled rules

[1] "§ 56. Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection."

"Insurrection" is defined by the preceding section. "§ 55. Insurrection shall consist in any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested, or intended to be manifested, by acts of violence."

[2] Maxwell v. Newbold et al., 18 How. 511, 516; Messenger v. Mason, 10 Wall. 507, 509; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 248; Harding v. Illinois, 196 U. S. 78, 85, 86-88.

of the state practice require. In that situation, the state supreme court declined to review any of the rulings of the trial court in respect of that and other preliminary issues; and this determination of the state court is conclusive here. *John* v. *Paullin*, 231 U. S. 583, 585; *Atlantic Coast Line R. R. Co.* v. *Mims*, 242 U. S. 532, 535; *Nevada-California-Oregon Ry.* v. *Burrus*, 244 U. S. 103, 105; *Brooks* v. *Missouri*, 124 U. S. 394, 400; *Central Union Co.* v. *Edwardsville*, 269 U. S. 190, 194-195; *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148, 154; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 308.

The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. *Texas &c. R'y Co.* v. *Southern Pacific Co.*, 137 U. S. 48, 54; *Loeber* v. *Schroeder*, 149 U. S. 580, 585; *Godchaux Co.* v. *Estopinal*, 251 U. S. 179, 181; *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114, 117; *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 454-455, and cases cited.

Petitioner, however, contends that the present case falls within an exception to the rule—namely, that the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. *Saunders* v. *Shaw*, 244 U. S. 317, 320; *Ohio* v. *Akron Park District*, 281 U. S. 74, 79; *Missouri* v. *Gehner*, 281 U. S. 313, 320; *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 677-678; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 164; *Gt. Northern Ry.* v. *Sunburst Co.*, 287 U. S. 358, 367. The whole point, therefore, is whether the ruling here assailed should have been anticipated.

The trial court instructed the jury that the evidence would not be sufficient to convict the defendant if it did not indicate that his advocacy would be acted upon immediately; and that—"In order to convict the defendant, . . . it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or was advocated." Petitioner urges that

the question presented to the state supreme court was whether the evidence made out a violation of the statute as thus construed by the trial court, while the supreme court construed the statute (178 Ga., p. 855) as not requiring that an insurrection should follow instantly or at any given time, but that "it would be sufficient that he [the defendant] intended it to happen at any time, as a result of his influence, by those whom he sought to incite", and upon that construction determined the sufficiency of the evidence against the defendant. If that were all, the petitioner's contention that the federal question was raised at the earliest opportunity well might be sustained; but it is not all.

The verdict of the jury was returned on January 18, 1933, and judgment immediately followed. On July 5, 1933, the trial court overruled a motion for new trial. The original opinion was handed down and the judgment of the state supreme court entered May 24, 1934, the case having been in that court since the preceding July.

On March 18, 1933, several months prior to the action of the trial court on the motion for new trial, the state supreme court had decided *Carr* v. *State*, 176 Ga. 747. In that case section 56 of the Penal Code, under which it arose, was challenged as contravening the Fourteenth Amendment. The court in substance construed the statute as it did in the present case. In the course of the opinion it said (p. 750):

"It [the state] can not reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency. . . . 'Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government without waiting until there is a present and imminent danger of the success of the plan advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law.' "

The language contained in the subquotation is taken from *People* v. *Lloyd*, 304 Ill. 23, 35, and is quoted with approval by this court in *Gitlow* v. *New York*, 268 U. S. 652, 669.

In the present case, following the language quoted at an earlier point in this opinion to the effect that it was sufficient if the defendant intended an insurrection to follow *at any time*, etc., the court below, in its original opinion, (178 Ga. 855) added—"It was the intention of this law to arrest at its incipiency any effort to overthrow the State government, where it takes the form of an actual attempt to incite others to insurrection." The phrase "at any time" is not found in the foregoing excerpt from the *Carr* case, but it is there in effect, when the phrase is given the meaning disclosed by the context, as that meaning is pointed out by the court below in its opinion denying the motion for a rehearing (179 Ga. 600), when it said that the phrase was necessarily intended to mean within a reasonable time—"that is, within such time as one's persuasion or other adopted means might reasonably be expected to be directly operative in causing an insurrection".

Appellant, of course, cannot plead ignorance of the ruling in the *Carr* case, and was therefore bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review here by appropriate action upon the original hearing in the court below. It follows that his contention that he raised the federal question at the first opportunity is without substance, and the appeal must be dismissed for want of jurisdiction.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 665.—October Term, 1934.

Angelo Herndon, Appellant, vs. The State of Georgia, Appellee. } On Appeal from the Supreme Court of the State of Georgia.

[May 20, 1935.]

Mr. Justice Cardozo.

The appellant has been convicted of an attempt to incite insurrection in violation of § 56 of the Penal Code of Georgia. He has been convicted after a charge by the trial court that to incur a verdict of guilt he must have advocated violence with the intent that his advocacy should be acted on immediately and with reasonable grounds for the expectation that the intent would be fulfilled. The appellant did not contend then, nor does he contend now, that a statute so restricted would involve an unconstitutional impairment of freedom of speech. However, upon appeal from the judgment of conviction the Supreme Court of Georgia repudiated the construction adopted at the trial and substituted another. Promptly thereafter the appellant moved for a rehearing upon the ground that the substituted meaning made the statute unconstitutional, and in connection with that motion invoked the protection of the Fourteenth Amendment. A rehearing was denied with an opinion which again construed the statute and again rejected the construction accepted in the court below. Now in this court the appellant renews his plaint that the substituted meaning makes the statute void. By the judgment just announced the court declines to hear him. It finds that he was tardy in asserting his privileges and immunities under the Constitution of the United States, and disclaiming jurisdiction dismisses his appeal.

I hold the view that the protection of the Constitution was seasonably invoked and that the court should proceed to an adjudication of the merits. Where the merits lie I do not now consider, for in the view of the majority the merits are irrelevant. My protest is confined to the disclaimer of jurisdiction. The settled doc-

trine is that when a constitutional privilege or immunity has been denied for the first time by a ruling made upon appeal, a litigant thus surprised may challenge the unexpected ruling by a motion for rehearing, and the challenge will be timely. *Missouri* v. *Gehner*, 281 U. S. 313, 320; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 678; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 164; *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 367; *Saunders* v. *Shaw*, 244 U. S. 317, 320. Within that settled doctrine the cause is rightly here.

Though the merits are now irrelevant, the controversy must be so far explained as to show how a federal question has come into the record. The appellant insists that words do not amount to an incitement to revolution, or to an attempt at such incitement, unless they are of such a nature and are used in such circumstances as to create "a clear and present danger" (*Schenck* v. *United States*, 249 U. S. 47, 52) of bringing the prohibited result to pass. He insists that without this limitation a statute so lacking in precision as the one applied against him here is an unconstitutional restraint upon historic liberties of speech. For present purposes it is unimportant whether his argument be sound or shallow. At least it has color of support in words uttered from this bench, and uttered with intense conviction. *Schenck* v. *United States, supra*; cf. *Whitney* v. *California*, 274 U. S. 357, 374, 375; *Fiske* v. *Kansas*, 274 U. S. 380; *Gitlow* v. *New York*, 268 U. S. 652, 672, 673; *Schaefer* v. *United States*, 251 U. S. 466, 482. The court might be unwilling, if it were to pass to a decision of the merits, to fit the words so uttered within the framework of this case. What the appellant is now asking of us is an opportunity to be heard. That privilege is his unless he has thrown it away by silence and acquiescence when there was need of speech and protest.

We are told by the state that the securities of the Constitution should have been invoked upon the trial. The presiding judge should have been warned that a refusal to accept the test of clear and present danger would be a rejection of the restraints of the Fourteenth Amendment. But the trial judge had not refused to accept the test proposed; on the contrary, he had accepted it and even gone a step beyond. In substance he had charged that even a present "danger" would not suffice, if there was not also an expectation, and one grounded in reason, that the insurrection would

begin at once. It is novel doctrine that a defendant who has had the benefit of all he asks, and indeed of a good deal more, must place a statement on the record that if some other court at some other time shall read the statute differently, there will be a denial of liberties that at the moment of the protest are unchallenged and intact. Defendants charged with crime are as slow as are men generally to borrow trouble of the future.

We are told, however, that protest, even if unnecessary at the trial, should have been made by an assignment of error or in some other appropriate way in connection with the appeal, and this for the reason that by that time, if not before, the defendant was chargeable with knowledge as a result of two decisions of the highest court of Georgia that the statute was destined to be given another meaning. The decisions relied upon are *Carr* v. *The State* (*No. 1*), 176 Ga. 55, and *Carr* v. *The State* (*No. 2*), 176 Ga. 747. The first of these cases was decided in November, 1932, before the trial of the appellant, which occurred in January, 1933. The second was decided in March, 1933, after the appellant had been convicted, but before the denial or submission of his motion for a new trial. Neither is decisive of the question before us now.

Carr v. *The State, No. 1,* came up on demurrer to an indictment. The prosecution was under § 58 of the Penal Code, which makes it a crime to circulate revolutionary documents.* All that was held was that upon the face of the indictment there had been a wilful incitement to violence, sufficient, if proved, to constitute a crime. The opinion contains an extract covering about four pages from the opinion of this court in *Gitlow* v. *New York, supra.* Imbedded in that long quotation are the words now pointed to by the state as decisive of the case at hand. They are the words of Sanford, J., writing for this court. 268 U. S. at p. 669. "The immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen." A state "cannot reasonably be required to defer the adoption of

*§ 58. If any person shall bring, introduce, print, or circulate, or cause to be introduced, circulated, or printed, or aid or assist, or be in any manner instrumental in bringing, introducing, circulating, or printing within this State any paper, pamphlet, circular, or any writing, for the purpose of inciting insurrection, riot, conspiracy, or resistance against the lawful authority of the State, or against the lives of the inhabitants thereof, or any part of them, he shall be punished by confinement in the penitentiary for not less than five nor longer than twenty years.

measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."

To learn the meaning of these words in their application to the Georgia statute we must read them in their setting. Sanford, J., had pointed out that the statute then before him, the New York criminal anarchy act, forbade the teaching and propagation by spoken word or writing of a particular form of doctrine, carefully defined and after such definition denounced on reasonable grounds as fraught with peril to the state. There had been a determination by the state through its legislative body that such utterances "are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power." 268 U. S. at p. 668. In such circumstances "the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition." 268 U. S. 670. In effect the words had been placed upon an expurgatory index. At the same time the distinction was sharply drawn between statutes condemning utterances identified by a description of their meaning and statutes condemning them by reference to the results that they are likely to induce. "It is clear that the question in such cases [i. e. where stated doctrines are denounced] is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results." pp. 670, 671. Cf. *Whitney* v. *California, supra; Fiske* v. *Kansas, supra.*

The effect of all this was to leave the question open whether in cases of the second class, in cases, that is to say, where the unlawful quality of words is to be determined not upon their face but in relation to their consequences, the opinion in *Schenck* v. *United States,* supplies the operative rule. The conduct charged to this appellant—in substance an attempt to enlarge the membership of

the Communist party in the city of Atlanta—falls, it will be assumed, within the second of these groupings, but plainly is outside the first. There is no reason to believe that the Supreme Court of Georgia, when it quoted from the opinion in Gitlow's case, rejected the restraints which the author of that opinion had placed upon his words. For the decision of the case before it there was no need to go so far. Circulation of documents with intent to incite to revolution had been charged in an indictment. The state had the power to punish such an act as criminal, or so the court had held. How close the nexus would have to be between the attempt and its projected consequences was matter for the trial.

Carr v. *The State, No. 2,* like the case under review, was a prosecution under Penal Code, § 56 (not § 58), and like *Carr* v. *The State, No. 1,* came up on demurrer. All that the court held was that when attacked by demurrer the indictment would stand. This appears from the headnote, drafted by the court itself. After referring to this headnote, the court states that it may be "useful and salutary" to repeat what it had written in *Carr* v. *The State, No. 1.* Thereupon it quotes copiously from its opinion in that case including the bulk of the same extracts from *Gitlow* v. *New York.* The extracts show upon their face that they have in view a statute denouncing a particular doctrine and prohibiting attempts to teach it. They give no test of the bond of union between an idea and an event.

What has been said as to the significance of the opinions in the two cases against Carr has confirmation in what happened when appellant was brought to trial. The judge who presided at that trial had the first of those opinions before him when he charged the jury, or so we may assume. He did not read it as taking from the state the burden of establishing a clear and present danger that insurrection would ensue as a result of the defendant's conduct. This is obvious from the fact that in his charge he laid that very burden on the state with emphasis and clarity. True, he did not have before him the opinion in prosecution *No. 2,* for it had not yet been handed down, but if he had seen it, he could not have gathered from its quotation of the earlier case that it was announcing novel doctrine.

From all this it results that Herndon, this appellant, came into the highest court of Georgia without notice that the statute de-

fining his offense was to be given a new meaning. There had been no rejection, certainly no unequivocal rejection, of the doctrine of *Schenck* v. *United States*, which had been made the law of the case by the judge presiding at his trial. For all that the record tells us, the prosecuting officer acquiesced in the charge, and did not ask the appellate court to apply a different test. In such a situation the appellant might plant himself as he did on the position that on the case given to the jury his guilt had not been proved. He was not under a duty to put before his judges the possibility of a definition less favorable to himself, and make an argument against it, when there had been no threat of any change, still less any forecast of its form or measure. He might wait until the law of the case had been rejected by the reviewing court before insisting that the effect would be an invasion of his constitutional immunities. If invasion should occur, a motion for rehearing diligently pressed thereafter would be seasonable notice. This is the doctrine of *Missouri* v. *Gehner* and *Brinkerhoff-Faris* v. *Hill*. It is the doctrine that must prevail if the great securities of the Constitution are not to be lost in a web of procedural entanglements.

New strength is given to considerations such as these when one passes to a closer view of just what the Georgia court did in its definition of the statute. We have heard that the meaning had been fixed by what had been held already in *Carr* v. *The State*, and that thereby the imminence of the danger had been shown to be unrelated to innocence or guilt. But if that is the teaching of those cases, it was discarded by the very judgment now subjected to review. True, the Georgia court, by its first opinion in the case at hand, did prescribe a test that, if accepted, would bar the consideration of proximity in time. "It is immaterial whether the authority of the state was in danger of being subverted or that an insurrection actually occurred or was impending." "Force must have been contemplated, but . . . the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged." It would not be "necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly, or at any given time, but it would be sufficient that he intended it to happen at any time, as a result of his influence, by those whom he sought to incite." On the

motion for a rehearing the Georgia court repelled with a little heat the argument of counsel that these words were to be taken literally, without "the usual reasonable implications." "The phrase 'at any time', as criticized in the motion for rehearing, was not intended to mean at any time in the indefinite future, or at any possible later time, however remote." "On the contrary the phrase 'at any time' was necessarily intended, and should have been understood, to mean within a reasonable time; that is, within such time as one's persuasion or other adopted means might reasonably be expected to be directly operative in causing an insurrection." "Under the statute as thus interpreted, we say, as before, that the evidence was sufficient to authorize the conviction."

Here is an unequivocal rejection of the test of clear and present danger, yet a denial also of responsibility without boundaries in time. True, in this rejection, the court disclaimed a willingness to pass upon the question as one of constitutional law, assigning as a reason that no appeal to the Constitution had been made upon the trial or then considered by the judge. *Brown* v. *State*, 114 Ga. 60; *Loftin* v. *Southern Security Co.*, 162 Ga. 730; *Dunaway* v. *Gore*, 164 Ga. 219, 230. Such a rule of state practice may have the effect of attaching a corresponding limitation to the jurisdiction of this court where fault can fairly be imputed to an appellant for the omission to present the question sooner. *Erie R. Co.* v. *Purdy*, 185 U. S. 148; *Louisville & Nashville R. Co.* v. *Woodford*, 234 U. S. 46, 51. No such consequence can follow where the ruling of the trial judge has put the Constitution out of the case and made an appeal to its provisions impertinent and futile. Cf. *Missouri* v. *Gehner, supra; Rogers* v. *Alabama*, 192 U. S. 226, 230. In such circumstances, the power does not reside in a state by any rule of local practice to restrict the jurisdiction of this court in the determination of a constitutional question brought into the case thereafter. *Davis* v. *Wechsler*, 263 U. S. 22, 24. If the rejection of the test of clear and present danger was a denial of fundamental liberties, the path is clear for us to say so.

What was brought into the case upon the motion for rehearing was a standard wholly novel, the expectancy of life to be ascribed to the persuasive power of an idea. The defendant had no opportunity in the state court to prepare his argument accordingly. He had no opportunity to argue from the record that guilt was

not a reasonable inference, or one permitted by the Constitution, on the basis of that test any more than on the basis of others discarded as unfitting. Cf. *Fiske* v. *Kansas, supra*. The argument thus shut out is submitted to us now. Will men "judging in calmness" (Brandeis, J., in *Schaefer* v. *United States, supra*, at p. 483) say of the defendant's conduct as shown forth in the pages of this record that it was an attempt to stir up revolution through the power of his persuasion and within the time when that persuasion might be expected to endure? If men so judging will say yes, will the Constitution of the United States uphold a reading of the statute that will lead to that response? Those are the questions that the defendant lays before us after conviction of a crime punishable by death in the discretion of the jury. I think he should receive an answer.

Mr. Justice BRANDEIS and Mr. Justice STONE join in this opinion.